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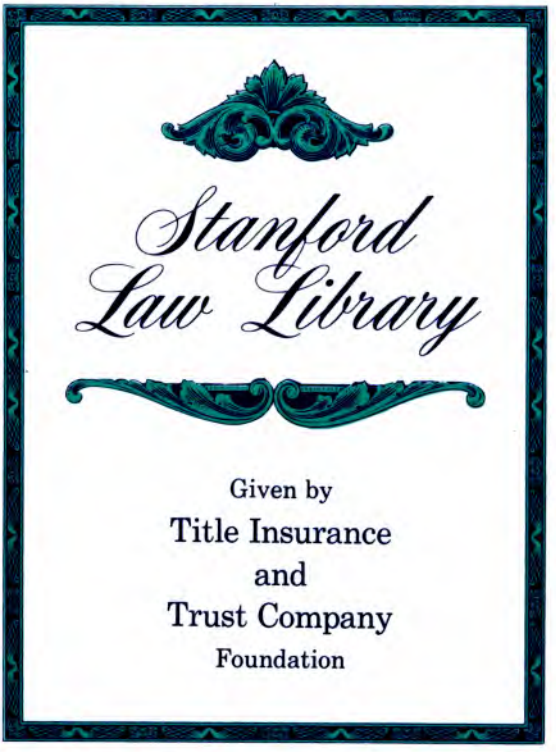
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A

TREATISE

ON THE

LAW OF SET OFF,

WITH AN

Appendix of Precedents.

BY OLIVER L. BARBOUR,
Counsellor at Law.

ALBANY:

PUBLISHED BY WM. & A. GOULD & CO. LAW BOOKSELLERS,
NO. 108, STATE-STREET,

AND BY GOULD, BANKS & CO. LAW BOOKSELLERS,
NO. 144, NASSAU-STREET, NEW-YORK.

G. M. Davison, Printer, Saratoga Springs.
1841.

Entered according to Act of Congress, in the year eighteen hundred and forty-one, by Wm. and A. Gould & Co. in the office of the Clerk of the Northern District of New-York.

TO

WILLIAM CURTIS NOYES, ESQ.,

THIS WORK IS INSCRIBED,

AS A TOKEN OF RESPECT, ESTEEM, AND GRATITUDE,

BY HIS FRIEND AND FORMER PUPIL,

THE AUTHOR.

PREFACE.

THE want of an American Treatise on the Law of Set Off has long been felt by the profession and judiciary. The only books upon this branch of the law are the English treatises of *Montague* and *Babington*. Mr. Montague's "Summary of the Law of Set Off" was published as long ago as 1801, and never reached a second edition in England. It was for many years the only guide to the law upon this subject; and considering that this work was professedly incomplete, it is perhaps not surprising that it should have been very imperfect. Judge Story speaks of Mr. Montague's book as being "singularly brief and unsatisfactory"—observing that "it consists of but three sentences."(*a*) Mr. Babington's Treatise was published in 1827, and is a work of much higher merit than Mr. Montague's. It was republished in this country some years

(*a*) See 5 Mason's Rep. 207.

since, in the Law Library, without any references, however, to the American, or recent English decisions.

In this country, the law of set off depends so much upon the various statutory enactments which have, from time to time, introduced changes in the common law, that an English treatise is, in many respects, inapplicable to our system; the more especially if it be unaccompanied with notes showing the particular points of difference, as well as of resemblance, between the English law and that existing here.

The importance of the subject, as well as the imperfections of the previous treatises thereon, have led to the compilation of the following work. It will doubtless be found to contain many errors; yet the author will not say, as is too customary in apologizing for a bad book, that "it has been compiled for his own use, without any view to publication." On the contrary, he wishes it distinctly understood, that this book *has* been compiled expressly for publication, and that the author has done his best to make it *worthy* of publication. Whether it is so or not, remains for the public to decide. It is anxiously hoped, however, that it may be found of some use to a profession whose indulgence towards the previous efforts of the author, merit his lasting gratitude.

SARATOGA SPRINGS, August 25, 1841.

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TREATISE, &c.

CHAP. I.

NATURE AND ORIGIN OF THE RIGHT OF SET OFF.

SET OFF is a mode of defence by which the defendant acknowledges the justice of the plaintiff's demand, but sets up a demand of his own against the plaintiff, to counterbalance it either in whole or in part.(*a*)

The statute of set off proceeds upon the equitable principle that where both debts are due, by the neglect of each party to perform his agreement, the one debt should compensate the other; so that neither party shall be permitted to recover money which is due from the other while he continues to withhold that which is legally and equitably due from himself.(*b*)

(*a*) Toml. Law Dict.
(*b*) Downer v. Eggleston, 15 Wend. Rep. 55, 56.

There are, however, some debts against which the debtor cannot propose a compensation: 1st. In the case of a spoliation, no compensation can be opposed against the demand for the restitution of the things of which any person has been plundered; 2d. A depositary is not admitted to oppose any compensation against a demand for the restitution of the deposit, *in causa depositi compensationi locus non est.* This, however, is to be understood with some qualification. The depositary cannot, indeed, oppose to the restitution of the deposit a compensation of the credits which he has against the person who entrusted him with it, when these credits arise upon other accounts;—but when the credit arises from the deposit itself, as for the expenses which he has been obliged to incur for the preservation of it, there is a right of compensation, not only in the case of an irregular deposit, but also with respect to the deposit of a specific thing which may be retained, *quasi quodam jure pignoris*, until the credit is discharged; 3d. The debt of a sum of money given or bequeathed to a person for his sustenance, and with a provision that it shall not be seized by his creditors, is a debt against which no compensation can be opposed.(*k*)

From what has been stated it will be perceived that the doctrine of compensation constituted an important part of the civil law. The main features of this system and of our right of set off are very similar; but there is this ma-

(*k*) 1 Poth. on Oblig. 366, 7, 8.

terial difference, that the doctrine of compensation is much more comprehensive and absolute than that of set off. Thus, by the civil law, wherever this doctrine applied, both debts were absolutely extinguished *ipso jure*. Therefore, in a case where my creditor of a certain sum afterwards becomes my debtor to the same amount, and, notwithstanding the compensation which has, *pleno jure*, extinguished our respective demands, I pay him the amount of his debt, I may recover the sum which I have so paid, by the action called *condictio indebiti*.(*l*) Whereas the right of *set off* is merely a defence to an action for the debt; and a defendant is not obliged, in any instance, to avail himself of this right, but may, at his option pay, or on other grounds contest, the one debt, and bring a separate action for the other.(*m*) But both himself and his attorney will incur the censure of the court for so doing, unless they can show good reason for not pleading such set off in the former suit.(*n*) If a party chooses to set off a demand, however, in an action brought against him, he cannot afterwards bring an action against the former plaintiff for the same demand. But if the set off was more than sufficient to cover the demand in the former suit, he may, according to the English practice, maintain an action for the surplus.(*o*) This practice, however, cannot be proper, and probably would not

(*l*) 1 Poth. on Oblig. 377.

(*m*) Green v. Law, 2 Smith, 668. De Sylva v. Henry, 3 Porter's Rep. 132. Garrow v. Carpenter, 1 id. 359. Himes v. Barnitz, 8 Watts, 39.

(*n*) Id. id.

(*o*) Hennell v. Fairlamb, 3 Esp. 104.

be tolerated here; as under our statute, if a balance is found due to the defendant, on a plea of set off, he may have judgment against the plaintiff in the action for the amount.(*p*) A new suit to recover such balance, of the plaintiff in the former action, is therefore entirely unnecessary.

If the creditor to whom the larger debt is due brings an action in which the other does not set off his mutual demand, but brings a counter action, the debt due to the first may be set off in the action by the last, and is not extinguished by his first obtaining a verdict for his whole debt; and he may take advantage of it in the action against him, remitting so much of what he has recovered as will reduce it to the balance.(*q*)

The principle that the debt is not extinguished by the right of set off is strongly illustrated by the case of *Pitts* v. *Carpenter*,(*r*) in which it was held that the plaintiff, to whom a larger debt than 40*s*. was originally due, but whose demand was reduced by set off to less than that sum, might bring his action in a superior court, and was not within the provisions of a local act, confining debts for less than 40*s*. to an inferior jurisdiction.

It is a principle of natural reason and justice that a claim due from the plaintiff in an action, to the defendant, should

(*p*) 2 R. S. 355, § 22.
(*q*) Baskerville v. Brown, 2 Burr. 1229.
(*r*) 1 Wils. Rep. 19.

compensate the demand sued for, as far as it will go, and that the balance only should be recovered; instead of allowing the plaintiff to recover the whole amount of his demand, and leaving the defendant to sue for the claim he has against the plaintiff. And besides the *justice* of the principle, the right of set off is to be encouraged, on the ground of *convenience*, as avoiding circuity of action. Yet by the common law of England if the plaintiff was as much, or even more, indebted to the defendant than the defendant was to him, yet he had no method of striking a balance. His only remedy was by going into a court of equity. A defendant might, indeed, have deducted from a claim made by action all fair allowances or demands accruing to him, or payments made by him in respect of the *same transaction* or account upon which the action was grounded. Hence in an action for work and labor or goods sold, the defendant might, though the contract were for a certain price, (at least after notice,) prove under the general issue, in reduction of the claim, that the work was improperly done.(*s*) Or he might show that the goods sold were not so good as warranted.(*t*) These, and other matters of the like kind, however, *arise out of the transaction itself* for which the suit is brought, and although they lessen the plaintiff's demand, yet they are not properly set offs; as their operation is to prove that the plaintiff's demand is too large; whereas a set off admits the

(*s*) Farnsworth v. Garrard, 1 Camp. 38. 2 id. 63. 2 Stark. Rep. 6. 7 East, 479.

(*t*) Fisher v. Samuda, 1 Camp. 190.

demand of the plaintiff, but sets up the defendant's demand to meet it.(*u*)

Until the reign of *Queen Anne*, if a person who owed me 1000*l*. became a bankrupt, and I was indebted to him in the sum of 50*l*. I must have paid the 50*l*. and have been left to my chance of any dividend upon my larger demand; or reversing the account, I must have paid the 1000*l*. entire, and have taken my chance of the dividend upon the 50*l*. If my debtor in the larger sum died, I must still have paid the debt due from myself, possibly for the satisfaction of his specialty creditors, and might entirely lose the whole of my cross demand.(*v*) The natural good sense of mankind was first shocked at this in the case of *bankrupts*; and it was provided for by 4 *Anne*, *ch.* 17, § 11, and 5 *Geo.* 2, *ch.* 30, § 28. In cases where there was *no* bankruptcy, the injustice of not setting off (especially after the death of either party,) was so glaring that parliament interposed, by the acts of the 2 and 8 of *Geo.* 2; by virtue of which, in actions where there are mutual debts, the defendant may set off the debt due to himself against that for which he is sued, either by pleading it in bar or giving it in evidence under the general issue, upon proper notice.(*w*)

The provisions of these statutes were so salutary and valuable, in avoiding circuity of action and preventing in-

(*u*) See 1 Har. & Edw. N. P. 347.
(*v*) See 2 Poth. on Oblig. 98.
(*w*) Green v. Farmer, 4 Burr. 2214.

justice, that they have been generally adopted, with some modifications, in the United States.

In this state the statutes upon this subject, although they have recognized the principle, from an early period, have not been uniform in their provisions. Our first statute relative to set off is contained in the revision of 1801. The provisions of this statute were somewhat modified and extended in the revision of 1813; but by the revised statutes of 1830, the right of set off, as it existed under the act of 1813, is curtailed, and made conformable, generally speaking, with the decisions under the act of 1801, and the English statutes of set off.(x) It was the design of the revisers, in reporting the sections of the revised statutes relative to set offs, to supply some defects which had been very generally complained of, and to reduce the law of set off to some certain and precise rules.(y) The language used by them is very happily chosen for this purpose, and expresses the intention with great clearness and precision. Some changes in the law have been introduced by the revised statutes, which will be pointed out as we progress.

Set off is in the nature of a cross action, substituted for the purpose of effectuating justice, without an accumulation of actions; and can only be set up for a specific sum, for which an action might be brought.(z)

(x) See Reab v. McAlister, 8 Wend. 109. 18 id. 143. 15 id. 160.
(y) See 3 R. S. 2d ed. 683.
(z) Whitehead et ux v. Cade, 2 Howard's R. 95.

Whether a set off be allowable in any particular case must be decided by the laws of the place where the action is pending.(*a*)

Before entering upon the subject of set off more minutely, it will be proper to notice a species of defence somewhat analogous to it in character, which a defendant is in some cases allowed to make, and which is called *recoupment*.(*b*) This is where the defence is not presented as a matter of set off arising on an independent contract, but for the purpose of reducing the plaintiff's damages for the reason that he himself has not complied with his cross obligations arising under the same contract.(*c*) Thus, in an action to recover compensation for services rendered, the employer is entitled to show, by way of *recoupment* of damages, loss sustained by him through the *negligence* of the person employed.(*d*) So, in an action for the recovery of the price of an article, sold with warranty of its goodness, or in relation to which there was a fraudulent misrepresentation, the defendant, on notice given with his plea, may give evidence of the fraud or breach of warranty in diminution of the plaintiff's claim.(*e*) Such evidence being

(*a*) Gibbs et ux v. Howard, 2 N. Hamp. R. 296.

(*b*) *Recoupe* is derived from the French word *recouper*, to cut again. In law it signifies the right and the act of making a set-off, defalcation, or discount, by the defendant, to the claim of the plaintiff. 2 Bouvier's L. Dict. 331.

(*c*) See Still v. Hall, 20 Wend. 51.

(*d*) Id. ib.

(*e*) Reab v.McAlister, 8 Wend. 109.

allowed for the purpose of avoiding circuity of action, and to prevent further litigation upon the same matter.(*f*) And it seems to be now well settled in England, that where there has been a sale, either upon a warranty as to the goodness of the article sold, or upon a fraudulent misrepresentation of its value, if a suit is brought on the original contract of sale, the defendant may, upon notice of such defence, given with the general issue, prove the fraud or breach of warranty, in mitigation of damages.(*g*)

In *Kist* v. *Atkinson*,(*h*) where the plaintiff claimed commissions on the purchase of a cargo of wheat which he had shipped for the defendant, it appearing on the trial that the defendant had previously sued the plaintiff and recovered for a breach of the contract in not shipping such wheat as had been agreed upon between the parties, Lord Ellenborough said the plaintiff in the present suit might have given the facts in evidence in the former suit for the purpose of reducing the damages, and that the account was therefore closed between the parties by the former verdict.

And in a case where the plaintiff brought his action to recover the contract price of eight quarters of cinq-foin seed, which was warranted to be good new growing seed, the defendant, on a trial before Baron Garrow, was per-

(*f*) 4 Wend. 483, McAlister v. Reab.

(*g*) Per Chancellor Walworth, 8 Wend. 115. See 1 Camp. 38. 7 East, 484.

(*h*) 2 Cowp. 63.

mitted to show a breach of warranty, although he had not offered to return the seed, but had sowed part, and sold the residue; and the court of king's bench, on a subsequent application, confirmed the decision made at nisi prius.(*i*) So in an action for the price of a horse sold for 12 guineas and warranted sound, the defendant was allowed to reduce the plaintiff's damages to a very small sum, by proving that the horse was not according to the warranty.(*k*)

And the partial failure of the consideration of a note may be given in evidence by the defendant to reduce the amount of the plaintiff's recovery.(*l*)

It has also been decided in Pennsylvania that the defendant may give evidence of acts of *non-feasance*, or *mis-feasance* by the plaintiff, where these acts are *immediately connected with the plaintiff's cause of action;* such evidence not being admitted by way of set off, but for the purpose of defeating, in whole or in part, the plaintiff's cause of action.(*m*)

A distinction, however, has been taken by the English judges between a suit upon the original contract of sale, and a suit upon a note or other security taken for the con-

(*i*) Poulton v. Lattimore, 4 Man. & Ry. 208. 9 Barn. & Cress. 259.

(*k*) King v. Boston, 7 East, 481, n.

(*l*) Spalding v. Vandercook, 2 Wend. 431. Phibbs v. Heffnagle, 11 John. 50.

(*m*) Gogel v. Jacoby, 5 Serg. & Rawle, 122.

tract price, on such sale. In cases of the latter description, it has been held that the whole amount of the note, or other security, may be recovered, where there is no fraud, unless the warranty goes to the whole consideration.(*n*) Our courts have followed the English decisions on this subject so far as relates to the broad question of *recoupment*, but have not adopted the distinction between suits upon the original contract of sale and suits upon a bill or note given for the purchase money, or between a total or partial failure of consideration.(*o*)

Having thus stated, preliminarily, the nature and origin of the right of set off, and shown the distinction between it and *recoupment*, we are now to inquire, II. What demands may be set off: III. In what actions a set off is allowable: IV. By and against what parties a set off may be had: V. As to the particulars of set off: VI. As to pleading, verdict, and judgment: and VII. As to set off in equity.

(*n*) Per Chancellor Walworth, 8 Wend. 116.

(*o*) Id. 117. Burton v. Stewart, 3 Wend. 239. See 11 John. 50. 13 id. 302. 2 Wend. 431.

CHAP. II.

WHAT DEMANDS MAY BE SET OFF.

1. The demand must be such as arises upon judgment or contract.
2. It must be due to defendant in his own right.
3. It must be against the plaintiff in the action, or the assignor, or person beneficially interested.
4. If there be several defendants, the demand must be due to all of them jointly.
5. It must be liquidated, or for property sold, or services done.
6. It must have existed, and belonged to defendant, when the action commenced.
7. It must not be barred by the statute of limitations.
8. Joint and separate demands.

1st. *The demand must be such as arises upon judgment or contract.*

The provision of the statute on this subject is as follows: "It must be a demand arising upon judgment or upon contract, express or implied, whether such contract be written or unwritten, sealed or without seal; and if it be founded upon a bond or other contract having

a penalty, the sum equitably due by virtue of its condition, only, shall be set off."(*a*)

Under this section, if the demand to be set off is not in the shape of a judgment, it must be founded upon a contract which could be sued upon in an action of assumpsit, debt, or covenant. A demand arising *ex delicto*, and for which either trespass, replevin, detinue, or an action upon the case would be the appropriate remedy, cannot therefore be set off.(*b*) And a claim recoverable only by action of account or bill in equity cannot be set off at law.(*c*)

Set-off of judgments.] The power of setting off judgments does not depend exclusively upon the statute, but in part upon the general jurisdiction of the courts over their suitors and process.(*d*) It is well settled at common law, that opposite demands arising upon judgments may, *upon motion*, be set off against each other, whenever such set-off is equitable, though the parties to the different records are not the same.(*e*) It is true, indeed, that the practice is in pursuance of the policy of the statute; but as was said by

(*a*) 2 R. S. 354, § 18, sub. 1.

(*b*) Sherman v. Ballou, 8 Cowen, 304.

(*c*) Id. ib.

(*d*) Simpson v. Hart, 1 John. Ch. Rep. 91; 14 John. 63, S. C. 3 Caines, 190. Dunkin v. Vandenburgh, 1 Paige, 623. Holden v. Gilbert, 7 id. 208. The People v. New-York Com. Pleas, 13 Wend. 652. 1 John. 144. 3 id. 247. 3 Bibb, 233. 4 T. R. 123.

(*e*) Montague on Set-Off, 6. 1 Hen. Black. 217. 2 Stra. 891. 3 Wils. 396. 8 T. R. 69. Dev. Eq. Rep. 392. 1 Murphy, 1. Best v. Lawson, 1 Miles, 10.

De Grey, Ch. J. in *Baker* v. *Braham*,(*f*) the courts have gone a little further than the letter of the statutes, by the rule of analogy, in cases within their power. Thus costs have been set off against costs, and also against debt and costs.(*g*)

Applications to set off mutual judgments are founded on no positive statute or fixed rule of law, but are addressed to the discretion of the court; which discretion will be so exercised as to do equity and not to sanction fraud.(*h*) This power to set off one judgment against another, *on motion*, is not a *legal* power, nor is its exercise demandable of right. It is discretionary; and the propriety of its exercise cannot be questioned upon a writ of error.(*i*)

With reference to the question of set-off, it is not material whether the different judgments are obtained by the verdict of a jury, by default, or upon a nonsuit; for they may in either case be set off against each other.(*k*) And it is no objection to a defendant's right to set off a judgment on motion, that it was recovered before the commencement of the action, and might have been pleaded by way of set-off.(*l*)

(*f*) 2 Black. 869; 3 Wils. 396, S. C.

(*g*) See The People v. New-York Common Pleas, 13 Wend, 652.

(*h*) Tolbert v. Harrison, 1 Bailey, 599.

(*i*) Burns v. Thornburgh, 3 Watts, 78. Scott v. Rivers, 1 Stew. 24. Holmes v. Robinson, 4 Ohio R. 91.

(*k*) Bab. on Set-Off, 103. 2 Black. Rep. 826. 8 T. R. 69. 2 H. Black. 440.

(*l*) Barker v. Braham, 2 Black. 869.

But this equitable rig t of setting off one judgment against another exists only where it will infringe upon no other right of equal grade. Therefore it will not be permitted against an equitable assignee for value.(*m*) And where a stay of execution has been obtained by each defendant, under acts of the legislature, which time has not expired, in either case the court will not interfere.(*n*) So a judgment against an executor, in his own right, will not be ordered to be set off against a judgment in his favor on a promissory note taken for goods of his testator sold by him, if it appears that the creditors or legatees of the testator will be thereby prejudiced.(*o*) So an administrator who has purchased a judgment against the plaintiff since the rendition of a judgment against him for a debt owing by the intestate, will not be allowed by the court, in the exercise of its equitable powers, to set off such judgment.(*p*)

Effect of taking a defendant in execution.] An imprisonment of the defendant upon a *ca. sa.* is a full satisfaction of the debt, so long as it continues, except in certain cases provided for by statute. A judgment, therefore, upon which the defendant is in execution will not be set off against another judgment in his favor.(*q*) So a voluntary

(*m*) Best v. Lawson, 1 Miles, 10. Dunkin v. Calbraith, 1 Bro. 47.
(*n*) 1 Miles' Rep. 10.
(*o*) Tolbert v. Harrison, 1 Bailey, 599.
(*p*) Hills v. Tallman's adm'r, 21 Wend. 674.
(*q*) Cooper v. Bigelow, 1 Cowen, 56. McGuinty v. Herrick, 5 Wend. 243. Foster v. Jackson, Hob. 59. Taylor v. Waters, 2 Chit. Rep. 303; S. C. 5 Maule & Sel. 103. Poucher v. Holley, 3 Wend. 184.

discharge by a creditor, of his debtor, from imprisonment on a *ca. sa.* discharges the debt and judgment, and prevents it from being set off. And this even though it was not the intention of the creditor to discharge the debt.(*r*) So where a prisoner in execution was discharged by consent of his creditor, upon giving a fresh security to satisfy the judgment; and that security was afterwards defeated, on account of a mere informality, the judgment was held satisfied, and was not allowed to be set off against a demand of the prisoner.(*s*) But if the defendant in execution *escapes*, or is discarged under an insolvent act, the plaintiff is remitted to his former rights, the imprisonment is no longer a satisfaction, and the plaintiff may use the judgment as a set-off against a demand of the defendant, or proceed anew against his person or property.(*t*)

It has been held by the superior court of New-York, that the principle that the imprisonment of the party is a satisfaction of the judgment does not apply to interlocutory costs which can only be enforced by attachment, and in relation to which, therefore, the plaintiff in pursuing that course, cannot be regarded as electing to take the body of the defendant in satisfaction. Accordingly, in the case of *Hesketh* v. *Mulock*, cited by Mr. Graham in his Practice,(*u*)

(*r*) Poucher v. Holley, 3 Wend. 184. Barnes, 205. 2 East, 243. 5 John. 364. 11 id. 476. 16 id. 183. 1 Barn. & Ald. 297.

(*s*) Jacques v. Witby, 1 T. R. 557.

(*t*) McGuinty v. Herrick, 5 Wendell, 240. Cooper v. Bigalow, 1 Cowen, 207.

(*u*) Gra. Prac. 307.

where costs had been ordered against the plaintiff for neglecting to proceed to trial, that court, on the application of the plaintiff, directed the costs to be set off, notwithstanding the defendant had been attached for the former costs, and was then imprisoned therefor.

Judgments of different courts.] As a general rule, judgments recovered in other courts will be set off, on motion, in the same manner as if they had been recovered in the court in which they are offered as offsets. Thus a judgment recovered in the common pleas may be set off against a judgment in the supreme court;(*v*) or one judgment at law against another, by the court of chancery;(*w*) a judgment of the court of king's bench against a judgment in the common pleas,(*x*) and *vice versa*;(*y*) or a judgment at law against a decree in equity.(*z*) And in such cases either court may, in general, direct the set-off.(*a*) But where a judgment of reversal had been obtained, in the supreme court, of a judgment in the common pleas, a restitution awarded, and afterwards a second judgment was obtained by the same plaintiff against the same defendant, in the common pleas, the supreme court refused to set off the judgment of reversal against the second judgment; as it

(*v*) Schermerhorn v. Schermerhorn, 3 Caines' Rep. 190.
(*w*) Gridley v. Garrison, 4 Paige, 647.
(*x*) Barker v. Braham, 2 W. Black. Rep. 869; S. C. 3 Wils. 396.
(*y*) Bridges v. Smith, 8 Bing. 29. 1 Moore & Scott, 93.
(*z*) Holden v. Gilbert, 7 Paige, 208.
(*a*) Simpson v. Hawley, 1 Maule & Sel. 696. 1 John. Ch. Rep. 94. 3 Caines, 190. 1 John. 146.

might be set off by the common pleas, and the execution to be stayed or reduced in amount was one to be issued, if at all, from the common pleas.(*b*)

This right to set off one judgment against another applies not merely to judgments in different courts of record, but has also been extended to judgments in justices' and other inferior courts;(*c*) although where the judgment in the justice's court was on an attachment, without the defendant's appearing there, it has been refused; such a judgment being regarded as merely *prima facie* and not conclusive evidence of a debt.(*d*)

Set off of judgments by assignees.] Nor is the right of set off confined to the original parties, but extends to assignees of judgments, in courts of record. But the party claiming the right must be really the assignee, and not the agent or trustee of another. He must be the absolute owner, holding the beneficial control of the judgment, or he cannot set it off.(*e*) And it is necessary that the assignee should have purchased the judgment absolutely, and not merely with a view to the set off. Thus, where a judgment was purchased by a party with a view of setting it off, and with a condition that if he failed to obtain the set off, on motion, the assignment should be void; and accom-

(*b*) Brewerton v. Harris, 1 John. 144.

(*c*) Ewen v. Terry, 8 Cowen, 126. Williams v. Evans, 2 McCord, 203. Duncan v. Bloomstock, id. 318.

(*d*) People v. The Judges of Delaware, 6 Cowen, 598.

(*e*) Turner v. Satterlee, 7 Cowen, 481. Aikin v. Satterlee, 1 Paige, 289. 13 Wend. 653.

panied by a stipulation that the assignee should be indemnified against the costs of the motion, it was decided that the judgment could not be set off.(*f*) And it is doubtful whether the principle can be extended to the assignee of a justice's judgment.(*g*) It would seem not, unless a plain undisputed case were presented. Thus, where it was alleged that the assignor of a justice's judgment was but a nominal plaintiff, and his rights were involved in intricacy and doubt, the court refused to allow such judgment to be set off, on motion, by the assignee.(*h*) And the right of setting off one judgment against another will not be permitted against an equitable assignee for a valuable consideration.(*i*)

Set off not barred by writ of error.] A judgment may be pleaded by way of set off, though a writ of error be pending thereon.(*k*)

As to the cause of action.] For the purpose of a set off, under the statute, it is sufficient that the demand sought to be set off is a judgment. It is immaterial for what cause of action the same was recovered, whether it arose upon contract or tort, or whether the same was rendered for costs merely.(*l*)

(*f*) Gilman v. Van Slyck, 7 Cowen, 469.

(*g*) See Grah. Prac. 305.

(*h*) See Story v. Patten, 3 Wend. 331.

(*i*) Ramsey's Appeal, 2 Watts, 228.

(*k*) Reynolds v. Beerling, 3 T. R. 188, n.; S. C. 1 Doug. 112. The People v. N. Y. Com. Pleas, 13 Wend. 649.

(*l*) Edw. Tr. 59.

As to judgments being in same or different rights.] It is not necessary that the judgments should be in the same right, or that the parties to the records should be the same, to enable the court to direct a set off. It is enough if the judgment prayed to be set off may be enforced at law against the party recovering the judgment to be satisfied by set off; as when, in an action of assault and battery, a judgment was recovered against two defendants, and in a cross action a judgment was also recovered by one of them against the plaintiff in the first, it was held that those judgments were proper matter, of set off; inasmuch as either defendant was liable in the first action to the whole amount, without the right to a contribution from his co-defendant.(*m*)

So where A. effected a policy of insurance on a vessel "for himself and others interested and concerned in the same," and a loss having taken place, his executors obtained a judgment against the underwriter B., who had, in the life-time of the testator, obtained a judgment against him, it was held that B. was entitled to set off his judgment against that of A.'s executors, although it appeared that one half of the vessel was owned by another person.(*n*) But it has been decided in Pennsylvania that a judgment obtained by A. against B. and assigned to C., cannot be set off against a judgment obtained by B. against C., when

(*m*) Simpson v. Hart, 14 John. 63. But see Dunkin v. Calbraith, 1 Browne, 48.

(*n*) Hazlehurst et al. v. Bayard, 3 Yeates, 152.

B. has, previously to the assignment of the judgment to C., made over his property for the benefit of his creditors generally.(*o*) A judgment for plaintiff in the common pleas may be set off against a judgment for defendant in the king's bench, although the plaintiff be dead and the judgment assets in the hands of her administrator.(*p*)

So, in *Mitchell* v. *Oldfield*,(*q*) the plaintiff had recovered a judgment against the defendant. But the defendant having also recovered in another action against this plaintiff and another, obtained a rule to show cause why the debt and costs in the latter should not be set off against the judgment in the former action, suggesting, among other reasons, that Mitchell had absconded. In shewing cause against this rule, it was contended, that inasmuch as one debt was due to the plaintiff alone, whereas the other was the joint debt of the plaintiff and another, to the defendant, the court would not interfere; and it was observed, that this was not such a debt as could be set off under the statute. But the rule was made absolute on the defendant's entering a *remittitur* in the cause in which he was plaintiff.

It is also settled that a judgment recovered in the name of a trustee for the benefit of the *cestui que trust* may be

(*o*) Dunkin v. Calbraith, 1 Browne, 47.

(*p*) Bridges v. Smith, 8 Bing. 29. 1 Moore & Scott, 93. 1 Dowl. P. C. 242, S. C.

(*q*) 4 T. R. 123. See also 2 H. Black. 587.

set off against a judgment recovered by the defendant against the *cestui que trust.*(*r*)

And where A. had brought an action against B. and others, and had recovered a verdict therein; and his costs and damages amounted to 17*l.* 11*s.*; and B. alone had brought an action against A., in which he had recovered a verdict, and his damages and costs amounted to 70*l.* 10*s.*, a rule was made absolute, that upon B.'s allowing to A. in the action in which B. was plaintiff, the sum of 17*l.* 11*s.* A. should be restrained from taking out execution upon the judgment which he had recovered.(*s*)

So where, in an action of trespass, there were three defendants, one of whom went to trial and obtained a verdict, but the two others suffered judgment by default, the court of common pleas in England permitted the costs and damages on the judgment by default to be deducted from the costs taxed on the *postea* to the defendant, who had a verdict.(*t*)

And where A. brought an action against B., and the expenses of defending which were borne by C. and D., and A. was nonsuited, afterwards C. brought an action against A., in which D. was interested as well as C., and C. was

(*r*) Barrett v. Barrett, 8 Pick. 342.
(*s*) Roberts v. Biggs, Barnes, 146.
(*t*) Schoole v. Noble, 1 H. Black. 23.

nonsuited; it was held that the costs of one nonsuit might be set against the other.(*u*)

But in an action against four defendants, where there was a verdict against one, and three were acquitted, the court refused to allow the costs of the latter to be set off against the costs due from the former.(*v*)

In the case of *Bourne* v. *Bennet*,(*w*) the court, on motion, allowed one of the defendants who was chiefly concerned, and who had indemnified his co-defendants, to set off a judgment against the plaintiff, recovered in a former action, against the damages and costs in the present. And the court of king's bench will permit defendants to set off a judgment recovered by them against the plaintiff, in opposition to a judgment obtained by the plaintiff against them; notwithstanding the plaintiff may also have a separate demand on one of the defendants.(*x*) But a judgment recovered by A. against B. and C. will not be set off on application to the general jurisdiction of the court, against another judgment recovered by the assignees of B. against A., inasmuch as the interests of third persons intervene.(*y*)

(*u*) O'Connor v. Murphy, 1 H. Black. 657.
(*v*) Mordecai v. Nutting, Barnes, 145.
(*w*) 1 Moore & Payne, 141. S. C. 4 Bing. 423.
(*x*) Glastyr v. Hewer, 8 T. R. 69.
(*y*) Doe v. Darnton, 3 East, 149.

Set off of costs.] To assist the parties in the recovery of costs, and to do justice between them, they are allowed to deduct or set off the costs, or debt and costs, in one action against those in another. Costs may not only be set against costs alone, but may also be set against debt and costs;(z) or debt alone.(a) Thus where several actions were brought on two policies of insurance underwritten by the same parties, (among whom were A. and B.) and were respectively consolidated; and in one of the causes which went to trial, A. was defendant, and in the other, B.; and A. became entitled to costs in one action, and B. to costs in the other; the costs taxed and allowed to B. were, on motion, allowed to be set off against those taxed and allowed to the plaintiff.(b) But a judgment for costs obtained against an administrator plaintiff in one court and assigned by the defendant there to A. cannot be set off against a judgment for damages obtained by such administrator in another court.(c)

Where an action was brought for two separate sums of money, one of which the defendant offered to pay, with all costs to that time, and the plaintiff's attorney refused to stay proceedings upon those terms, and the defendant paid that sum into court; but the plaintiff afterwards finding that he could not support the action for the other part of

(z) Bab. on Set Off, 95, 96.
(a) Harmer v. Harris, 1 Russ. 155.
(b) Nunez v. Modigliani, 1 H. Black. 217.
(c) McWilliams v. Hopkins, 1 Whart. 275.

his demand, took the money out of court and discontinued the action, the court allowed the defendant his costs from the date of his offer to pay the sum paid into court, and directed that the same should be set off against the plaintiff's costs.(*d*)

So where the plaintiff had recovered a verdict against the defendant in trespass, and at the same assizes the defendant had recovered a verdict against the plaintiff in ejectment, and the defendant moved to have the costs of the ejectment deducted from the costs payable to the plaintiff in the action of trespass, the rule for that purpose was made absolute.(*e*)

And the costs of a suit in equity may be set off against the costs of an action in the common pleas.(*f*) And where, in a suit for tithes the plaintiff obtained a decree, with costs, for part of his demand, and as to the remainder, issues were afterwards found for the defendant, the court of exchequer stayed the payment of the costs decreed to the plaintiff, in order that the defendants might have an opportunity to set off, as against those costs, the costs of the issues.(*g*)

And as costs may be set off against costs alone, so they may be set off against debt and costs. This appears from

(*d*) James v. Raggett, 2 Barn. & Ald. 776.
(*e*) Scoffin v. Robinson, cited in 2 Black. 826.
(*f*) Webber v. Nicholas, 4 Bing. 16; S. C. 12 Moore, 87.
(*g*) Taylor v. Cook, 1 Younge, 201.

the case of *Thrustout* v. *Crafter*,(*h*) in which a motion was made that the costs of a nonsuit in ejectment might be set off against the costs in another action; and it was contended that there was a difference in the nature of the executions themselves. One was for debt as well as costs, for which an action would lie on the judgment; that the other was merely for costs, which could only be recovered by process of contempt; but the court made the rule absolute. Costs may also be set off against debt alone. Thus in a suit for the administration of assets, a debtor to the estate, who is entitled to have his costs of suit out of the fund, will not be allowed to receive payment of them, while his debt continues unsatisfied; but the costs due to him will be set off *pro tanto* against the debt due from him.(*i*)

But the court will not order costs from one party to another to be set off against a sum obtained from the former by the latter, to obtain his liberation from an illegal arrest, but ordered by the court to be repaid.(*k*)

Attorney's lien.] Formerly, the practice in this state, in relation to a set off of costs, was to allow them to be set off against the *damages* recovered by the plaintiff in the previous suit, but not against the *costs*; and this was upon the principle of protecting the attorney's lien for his

(*h*) 2 Black. Rep. 826.
(*i*) Harmer v. Harris, 1 Russ. 155.
(*k*) Pitt v. Combs, 1 Harr. & Woll. 13.

costs.(*l*) The rule now, however, is otherwise; and it is well settled by modern authorities that the lien of the attorney extends only to the clear balance due after the equities between the parties are adjusted; and does not affect the equitable right of set off between them.(*m*) Thus a judgment for costs only, will be set off against another judgment, on motion, notwithstanding the attorney's lien, and although the judgment be assigned to him by his client as security for his costs, of which notice is given to the opposite party, with directions not to arrange the costs with the client; especially where the right of set off had attached, and the attorney had full notice that it was claimed, at the time he took the assignment.(*n*) So a defendant against whom a verdict is rendered for nominal damages, in an action of tort, may, after the verdict, procure an assignment of a judgment against the plaintiff in the suit in which the verdict is rendered, and may set off such judgment against the judgment entered upon the verdict, although such latter judgment consists entirely of costs, with the exception of the nominal damages, notwithstanding the lien of the attorney; the equities of the parties being considered superior to those of the attorney.(*o*) But the attorney's lien for costs recovered will not be suspended, or satisfaction of the judgment delayed, until an

(*l*) Cole v. Grant, 2 Caines' Rep. 105. Devoy v. Bowyer, 3 John. Rep. 247.

(*m*) Mohawk Bank v. Burrows, 6 John. Ch. Rep. 317. Porter v. Lane, 8 John. 357. 13 id. 306.

(*n*) Cooper v. Bigalow, 1 Cowen, 206.

(*o*) The People v. New-York Com. Pleas, 13 Wend. 649.

unliquidated claim of the opposite party can be ascertained and a balance finally struck between the parties.(*p*)

And attorneys will be protected against the *frauds* of the parties to the suit; as where *notice* is given to a party liable to the payment of costs that they belong to the attorney, and the costs are subsequently paid to the client of the attorney, the party will, notwithstanding, be compelled to repay them to the attorney.(*q*) So where the parties, by a collusive settlement, attempt to deprive the attorney of his costs, and where no equitable right of set-off is claimed.(*r*) So where a party against whom a judgment for costs has been obtained, subsequently purchases a judgment, with a knowledge of, and for the purpose of defeating the attorney's lien.(*s*) But unless notice be given by the attorney to the opposite party not to pay the judgment to his client until his claim for costs be satisfied, the client may compromise with the other party and give him a release, without the intervention of his attorney; and in such a case the attorney can only look to his client afterwards, for payment.(*t*)

In England, different rules prevail in the various courts, in setting off judgments, with reference to the attorney's

(*p*) Mohawk Bank v. Burrows, 6 John. Ch. Rep. 317.

(*q*) 13 Wend. 649. Power v. Kent, 1 Cowen, 172. 3 Caines, 166. Lane v. Pearce, 12 Price, 752. 4 T. R. 123. 6 id. 361. Doug. 238.

(*r*) Martin v. Hawks, 15 John. 407.

(*s*) Bradt v. Loon, 4 Cowen, 416.

(*t*) Doug. 238. 1 Taunt. 341.

lien for costs. The *king's bench* will only allow the set-off to be made subject to the attorney's lien on the judgment for his costs.(*u*) And the same practice prevails in the Irish court of king's bench.(*v*) But in the *common pleas* the rule is the same as that adopted by our court, viz. that costs may be set off, notwithstanding the lien of the attorney.(*w*) A similar rule exists in the court of *exchequer* ;(*x*) and in *equity*.(*y*)

This doctrine of the courts of common pleas, exchequer, and chancery, in England, and of the supreme court of this state, has also been adopted by our court of chancery.(*z*) But the rule is so far qualified in the latter court, as to limit the right of set-off in prejudice of the solicitor's lien, to such claims as arise in the course of the *same suit* or in relation to the *same matter*. Therefore a party against whom a decree for costs had been made will not be permitted by that court to offset against such costs a decree or judgment in his favor in relation to a *distinct matter*, to the prejudice of the solicitor's lien.(*a*)

(*u*) 4 T. R. 123. 6 id. 456. 8 id. 69. 1 Maule & Sel. 240. 3 Barn. & Cress. 535. 3 Barn. & Adol. 388. 1 Dowl. P. C. 196. 8 Bing. 303. 1 Moore & Scott, 429. 2 Cromp. & Jer. 195.

(*v*) Reddy v. Bradshaw, Ratty's Term Rep. 566. Miracke v. Howard, id. 568.

(*w*) 2 Bos. & Pul. 28. 1 H. Black. 23. Id. 217. Id. 657. 2 id. 440, 587, 826. 4 Taunt. 322. 3 Wils. 396. 1 N. R. 22. 8 East, 362.

(*x*) Lane v. Pearce, 12 Price, 742.

(*y*) Worrall v. Johnson, 2 Jac. & Walk. 215. Taylor v. Popham, 15 Ves. 72. Ex parte Rhodes, id. 539. 2 Mad. Ch. Pr. 569. Shine v. Gough, 2 Ball & Beat. 33.

(*z*) 6 John. Ch. R. 317, Mohawk Bank v. Burrows.

(*a*) Dunkin v. Vandenbergh, 1 Paige, 622.

In accordance with the general rule above referred to, it has been decided by the court of common pleas, where A. brought an action for use and occupation against B., and recovered a verdict; and B. afterwards commenced an action of trespass against A. for seizing his cattle for rent due, and A. suffered judgment by default; and on a writ of inquiry B. recovered 1*l.* more in damages than A. had obtained in his action—that the costs of the one might be set off against the other, although it appeared that A. was insolvent, and that his attorney would thereby be deprived of his security for costs.(*b*) Similar decisions were made by the same court in *Vaughan* v. *Davies*,(*c*) *Daniel* v. *Elliott*,(*d*) *Bourne* v. *Bennett*,(*e*) and *Roberts* v. *Briggs*.(*f*)

And the court of *king's bench* has recognized the right of set-off as respects *interlocutory* costs. Thus it has allowed interlocutory costs due from the plaintiff to the defendant, to be set off against the damages and costs recovered by the plaintiff on the final event of the suit, without regard to the lien of the defendant's attorney, which was held to attach only on the general result of the costs, &c. of the cause.(*g*) And this decision has since been confirmed by the court of exchequer, where a defendant having obtained an order for costs for not proceeding

(*b*) Lomas v. Mellor, 5 Moore, 95.
(*c*) 2 H. Black. 440.
(*d*) Id. 587.
(*e*) 4 Bing. 423; S. C. 1 Moore & Payne, 141.
(*f*) Barnes' Suppl. 12.
(*g*) Howell v. Hardy, 8 East, 362.

to trial, was allowed to set them off against the damages ultimately recovered by the plaintiff on the trial of the cause.(*h*) So where a plaintiff, after giving notice of trial, withdrew his record and the defendant obtained a rule for the payment of the costs of the day, which were taxed, and at the next assizes the plaintiff obtained a verdict which was afterwards set aside on payment of costs, the court of king's bench held that the defendant might set off the costs due *to* him against those payable *by* him, on the rule for the new trial.(*i*) So where costs had been ordered against the defendant on the denial of a motion for a commission, on the ground of irregularity, and afterwards he obtained costs against the plaintiff for neglecting to proceed to trial, the superior court of New-York directed the costs to be set off.(*k*) But where, by a judge's order, the defendant was allowed to go to trial upon payment of a certain sum of money, together with the costs of the cause up to the date of the order; and the defendant having recovered a verdict without previously complying with the terms of the order, it was held that the costs taxed in his favor on the postea could not be set off against the interlocutory costs, so as to deprive the plaintiff's attorney of his lien.(*l*) So where an execution was set aside with costs, as having been sued out after the allowance of a writ of error, the court of common pleas refused to permit the costs of the

(*h*) Lang v. Webber, 1 Price, 375.

(*i*) 9 Barn. & Cress. 760, Doe v. Allsop.

(*k*) Hesketh v. Mulock, cited in Gra. Prac. 307.

(*l*) Aspinwall v. Stamp, 4 Dowl. & Ryl. 716. S. C. 3 Barn. & Cress, 108.

application to be set off, against the costs of the action, but compelled the plaintiff to pay them forthwith.(*m*)

Where the solicitor in a suit is entitled to the costs awarded against the adverse party, the latter has an equitable claim to have such costs offset or applied upon a judgment in his favor against the solicitor. And the assignee of such a bill of costs takes the same subject to such equitable right of offset if it existed at the time of the assignment.(*n*)

Nothing but judgments can be set off on motion.] In no case, however, will the court direct a set off to be made, unless the party applying has obtained a judgment.(*o*) And not even then unless it be at too late a stage of the cause for the party to avail himself of the set off by way of plea, or where he might have tried it in the original action.(*p*) Thus, the amount of a verdict recovered,(*q*) or of a note,(*r*) cannot be set off against the amount of a judgment.

And where the plaintiff, having obtained a verdict against the defendant, entered up judgment and sued out

(*m*) Hill v. Tebb, 1 New Rep. 511.
(*n*) Utica Ins. Co. v. Power, 3 Paige, 365.
(*o*) Barnes, 146.
(*p*) Philipson v. Caldwell, 6 Taunt. 176.
(*q*) Ex parte Bagg v. Jefferson C. P., 10 Wend. 615. Cobb v. Haydock, 4 Day, 472.
(*r*) Garrick v. Jones, 2 Dowl. P. C. 157.

execution against his goods, the common pleas in England refused to allow the sum levied to be impounded in the hands of the sheriff until an action which the defendant had commenced against the plaintiff, should be determined.(*s*) And a similar rule prevails in equity. Thus it has been decided in this state that the court of chancery will not, on motion, allow a debt which is not ascertained by judgment or decree to be set off against a decree for costs, to the prejudice of the solicitor's lien; although the validity of the debt is admitted by the client.(*t*)

And a judgment obtained by a defendant against the plaintiff, after the declaration delivered and before plea pleaded, cannot be offered as a set off.(*u*) Though it was formerly held otherwise.(*v*)

Set off of bonds.] In a proper action, that is, in an action founded upon demands which are themselves capable of being set off, according to law, the defendant may set off the sum due by virtue of the condition of a bond, whether it be for the payment of money or otherwise, provided the case is within the requirements of the statute in other respects. Thus an arbitration bond and an award under it in favor of the defendant may be set off. So a set

(*s*) Williams v. Cook, 10 Moore, 321.

(*t*) Dunkin v. Vandenburgh, 1 Paige, 622.

(*u*) Evans v. Prosser, 3 T. R. 186.

(*v*) Reynolds v. Beerling, 1 Doug. 112. 4 id. 181. 1 Tidd's Prac. 716.

off is allowable where the action is on an award or on a bond for the non-performance or non-payment of an award.(*w*) The penalty of a bond cannot be set off at common law any more than under the statute.(*x*)

The sum due on a bond may be set off against any demand recoverable under the common counts, or for which *indebitatus assumpsit* will lie.(*y*) And this although the defendant holds the bond as an assignee.(*z*) And a plaintiff cannot deprive the defendant of this right of set off, by declaring *specially* when he can recover his demand under a *general count*.(*a*)

A bond which has been cancelled cannot be set off.(*b*)

Where a defendant pleaded by way of set off a bond given to him by the plaintiff, conditioned for the payment of an annuity to a third person, which had been previously granted by the defendant, and that a certain sum was in arrear; it was held that he was not bound to prove that he had paid the money, in order to set it off, but that on production of the bond the plaintiff was bound to prove payment.(*c*)

(*w*) Burgess v. Tucker, 5 John. 105.
(*x*) Ibid.
(*y*) Tuttle v. Beebe, 8 John. 153. Downer v. Eggleston, 15 Wend. 51.
(*z*) 8 John. 153.
(*a*) 15 Wend. 51.
(*b*) Williams v. Crary, 5 Cowen, 368.
(*c*) Penny v. Foy, 8 Barn. & Cress. 11.

2d. *The demand must be due to defendant in his own right.*

The demand to be set off by the defendant must be due to him in his own right, either as being the original creditor or payee, or as being the assignee and owner of the demand.(*d*)

With reference to this question, demands are considered due to and from the same persons, in the same right, where the plaintiff may sue and the defendant be sued, in their own names, without specifying any representative character, and where the party to the suit has a lien upon, or a legal right to the application of the fund when collected. Upon this principle it has been held that the public administrator in the city of New-York is entitled to set off against a debt due from him to a bank, a demand for deposites in the bank, whether made in his own name or as public administrator; and also the bills of the institution in his hands.(*e*)

It is well settled in England that there can be no set off, either at law or in equity, where either of the debts is a debt *in auter droit*.(*f*)

(*d*) 2 R. S. 354, § 18, sub. 2.

(*e*) Miller v. Receiver of the Franklin Bank, 1 Paige, 444.

(*f*) Gale v. Luttrell, 1 Young & Jerv. 180. Whitaker v. Rush, Amb. 407. 5 Mad. 459. Buck, 125. And see 2 Yeates, 208.

Therefore an executor cannot, either at law or in equity, set off a demand purchased by him after the death of the testator or intestate, against a debt due by the estate to the person against whom he had the demand so purchased.(*g*) Neither can an executor set off an original debt due to him personally, against a claim of the defendant on the estate.(*h*) Nor, if sued for his own debt, can he set off what is due to him as executor. And where an executor sues for a cause of action arising after the testator's death, without describing himself as executor, the defendant cannot set off a debt to him from the testator.(*i*)

So, in an action against a man for his own debt, he cannot set off a demand due to him in right of his wife.(*k*) And a debt owing by the wife *dum sola* cannot be set off in an action brought by the husband alone, unless he has promised to pay the debt after marriage, and thereby made it his own.(*l*) Nor can a debt due from the wife *dum sola* be set off against a note given to the wife after marriage, if the husband elect to treat the note as his several property; as if he sue upon it in his own name, or endorse it over to a third party; and it is immaterial whether the wife join in the endorsement or not.(*m*)

(*g*) Mead v. Merritt, 2 Paige, 402. Hills v. Tallman's adm'r, 21 Wend. 674. See Root v. Taylor, 20 John. 137; Crew v. Williams, 2 Bibb, 263.

(*h*) Id. ib. Willes, 103, 264, n. (a.)

(*i*) Tidd's Pr. 9 Lond. ed. 666. Willes, 103, 106 (1), 264 (a).

(*k*) Bull. N. P. 179. Wilson v. Watson, Esp. N. P. 240. Grove v. Dubois, 1 T. R. 112.

(*l*) 2 Esp. Rep. 594. Burrough v. Moss, 10 Barn. & Cress. 558.

(*m*) Borough v. Moss, 5 Man. & Ryl. 296.

Upon the same principle, a joint debt cannot be set off against a separate demand, nor a separate debt against a joint one,(*n*) unless it be so agreed by the parties.(*o*) But a debt due to a defendant as surviving partner, may be set off against a demand on him in his own right,(*p*) and *vice versa*.(*q*) So, a debt due from an ostensible partner only may be set off in an action brought by him, together with his dormant partner.(*r*)

A defendant cannot plead, by way of set off, a bond debt of the plaintiff assigned to the defendant by another, to whom and for whose use it was originally given.(*s*)

But a debt due to the defendant as a surviving joint creditor, may be set off against a demand on him in his own right.(*t*) And, on the other hand, a debt from the plaintiff, as a surviving debtor, to defendant, may be set off against a debt due from the defendant to the plaintiff in his own right.(*u*) But a party who has neither a general or special property in goods placed by him in the hands of a manufacturer for finishing, who refuses to deliver them on demand, cannot set off the value of such goods in an

(*n*) 5 Maule & Sel. 439. But see Peake's Cas. N. P. 260. 2 Esp. Rep. 469, 594.
(*o*) Kinnerley v. Hossack, 2 Taunt. 170.
(*p*) 5 Durnf. & East, 493. 1 Esp. Rep. 47.
(*q*) 6 T. R. 582. 2 id. 476.
(*r*) Stacy v. Decy, 7 T. R. 361, n. S. C. 2 Esp. 469, n.
(*s*) Wake v. Tinkler, 16 East, 36.
(*t*) 5 T. R. 493. S. C. 1 Esp. Rep. 47.
(*u*) 6 T. R. 582.

action of assumpsit against him by the manufacturer for work and labor bestowed upon other goods. And a receiptor to the sheriff for goods levied upon by execution would not, under such circumstances, be entitled to claim a set off.(*v*)

It has been held in Pennsylvania that, as a general rule, the person having the *right of action* may set off a debt due to him, as a trustee, against a debt due by him in his own right. And where there is not a *legal* right of action, but there has been an equitable assignment of the *property* in the chose in action, the *cestui que trust* may set off his right of property against a demand on him in his own right; and a debt due to or from the *cestui que trust* may be set off in an action commenced against, or by, a trustee, in right of the trust.(*w*) But a bond given by the plaintiff to A. for the use of B., and not payable to assigns, and transferred by A. to the defendant, cannot be set off in an action on a bond given by the defendant to the plaintiff.(*x*)

A demand held by a defendant as assignee, at the commencement of the suit, provided it is of a nature capable of being set off under the sections of the statute hereafter to be noticed, may also be set off by him in the same manner as if it had been originally due from the plaintiff to him. Thus, the defendant may set off a bond executed by the

(*v*) Collins v. Butts, 10 Wend. 399. S. C. 13 id. 139.
(*w*) Wolf v. Beates, 6 Serg. & Rawle, 244.
(*x*) Ibid.

plaintiff;(y) or a judgment,(z) or account,(a) against him, which have been duly assigned to the defendant in his own right. To warrant the set off of a judgment, however, it is necessary it should have been purchased by the defendant absolutely, and not for the mere purpose of setting it off, and with a condition that if he fails to obtain the set off, such assignment shall be void.(b) To enable a party to set off a judgment, he must be the beneficial as well as the nominal owner of it.(c)

The assignment of a chose in action need not be by a writing or an instrument under seal. A delivery of it for a good and valid consideration is sufficient, even in the case of a specialty;(d) or judgment;(e) or a mortgage.(f) For courts will recognize and protect the rights of assignees.(g)

But it seems it ought to be alleged that the assignment was for a full and valuable consideration, and that it is a subsisting assignment, by an averment that the suit is prosecuted for the benefit of the assignee.(h) For it is settled

(y) Tuttle v. Beebe, 8 John. 152.
(z) Ford v. Stuart, 19 John. 342.
(a) Martin v. Williams, 17 John. 330.
(b) Gilman v. Van Slyck, 7 Cowen, 469.
(c) Satterlee v. Ten Eyck, id. 480.
(d) Prescott v. Hull, 17 John. 284.
(e) Ford v. Stuart, 19 id. 342.
(f) Runyan v. Mersereau, 11 John. 538.
(g) 3 John. 425. 16 id. 51. 4 T. R. 690.
(h) Prescott v. Hull, 17 John. 284.

that a chose in action which is assignable cannot be set off by a person to whom it is transferred, if he holds it merely as trustee for the person from whom he received it. Thus, where third persons holding the acceptance of a trader who was known to be in bad circumstances, agreed with the defendants, as a mode of covering the amount of the bill, that it should be endorsed to them, and that they should purchase goods of the trader, which were to be paid for by a bill at three months' date, or made equal to cash in three months, (before which time the trader's acceptance would be due,) but without communicating to the trader that they were the holders of his acceptance, the trader having become bankrupt and his assignees having brought an action of *assumpsit* to recover the value of goods sold and delivered to defendants; the court of king's bench held that the latter could not set off the bankrupt's acceptance, which they did not hold in their own right, but in effect for such other persons.(*i*)

Where the husband has received a legacy due to his wife, and has given security to refund in case of deficiency of assets, the executor cannot, in a suit of the husband and wife against him to recover the rents and profits of her real estate, show such deficiency, and set off the same against such claim for the rents and profits; the demands not being due in the same right.(*k*)

(*i*) Fair v. McIver, 16 East, 130.
(*k*) Mollan v. Griffith, 3 Paige, 402.

3d. The demand must be against the plaintiff in the action, or the assignor, or person beneficially interested.

The provisions of the statute are as follows: "It must be a demand against the plaintiff in the action, unless the suit be brought in the name of a plaintiff who has no real interest in the contract upon which the suit is founded; in which case no set off of a demand against the plaintiff shall be allowed, unless as hereinafter specified:

If the action be founded upon a contract, other than a negotiable promissory note, or bill of exchange, which has been assigned by the plaintiff, a demand existing against such plaintiff, or any assignee of such contract, at the time of the assignment thereof, and belonging to the defendant in good faith before notice of such assignment, may be set off to the amount of the plaintiff's debt, if the demand be such as might have been set off against such plaintiff or such assignee, while the contract belonged to him:

If the action be upon a negotiable promissory note, or bill of exchange, which has been assigned to the plaintiff, after it became due, a set off to the amount of the plaintiff's debt, may be made of a demand existing against any person or persons who shall have assigned or transferred such note or bill after it became due, if the demand be such as might have been set off against the assignor, while the note or bill belonged to him:

If the person be a trustee for any other, or if the suit be

in the name of a plaintiff who has no real interest in the contract upon which the suit is founded, so much of a demand existing against those whom the plaintiff represents or for whose benefit the action is brought, may be set off, as will satisfy the plaintiff's debt, if the same might have been set off in an action brought by those beneficially interested:

But if such action be brought by the assignee of an insolvent, imprisoned, absent, concealed or absconding debtor, no set off shall be allowed of any debt, unless in the cases provided in the fifth chapter of the second part of the revised statutes."(*l*)

Let us consider these provisions separately.

Demands against plaintiff in the action.] A debt due from a testator cannot be set off against a demand accruing to the executor after the testator's death.(*m*) Nor can an executor set off, either at law or in equity, a demand purchased by him after the death of the testator, against a debt due by the estate to the person against whom he held the demand so purchased.(*n*)

In some cases it seems that, provided the demand is against the plaintiff in the action, it is no objection to the

(*l*) 2 R. S. 354, § 7.
(*m*) Crew v. Williams, 2 Bibb, 263.
(*n*) Mead v. Merritt, 2 Paige, 402.

right of set off, as to such demand, that it is against others also. Thus the supreme court having decided in a late case, that an action might be maintained in the name of one of two partners of a law firm, where the particular business respecting which the suit was brought, was uniformly done in the name of the partner suing; they further held that in such a suit a set off of a demand against the firm would be allowed.(*o*) And it is settled that a debt due from one who was the only apparent trader may be set off in an action brought by himself and partners, if the defendant was ignorant of the partnership at the time the debt was contracted.(*p*) So in an action by a surviving partner for his separate debt, the defendant may set off a debt due on the partnership account; for he might sue the plaintiff for such debt.(*q*) And the rule is the same where the action is brought against a surviving partner.(*r*) And where the defendant gave a note to his bankers, on account of a debt due to them, and they endorsed the note to another firm, consisting of some of the partners of the banking house, it was held that in an action by the firm on the note, the defendant might set off a debt due to him from the bankers.(*s*)

But it is a general rule that a debt owing by one of two

(*o*) Platt v. Halen, 23 Wend. 456.

(*p*) Stracey v. Deey, 7 T. R. 361. 2 Esp. 469, n. Lord v. Baldwin, 6 Pick. 348.

(*q*) Slipper v. Stidstone, 5 T. R. 493. 1 Esp. 47. 2 T. R. 476.

(*r*) French v. Andrade, 6 T. R. 582.

(*s*) Puller v. Roe, Peake, 197.

or more partners cannot be set off against a partnership demand.(*t*) Neither can a partnership debt be set off against an individual debt due to one of the partners; although the notes and accounts of the firm have been transferred to such partner and he has undertaken to pay the debts of the partnership.(*u*) But this was a case where the suit was brought by the assignee of the individual partner, in his own name.

A demand against a private company cannot be set off against a note payable to the agents of such company and prosecuted by them in their individual names, although the note was taken for the benefit of, and belongs to, the company.(*v*)

Demands against assignor of a contract.] Under the above subdivision of the section of the statute which relates to set off against assignors of contracts, it has been decided that where an action is brought upon a contract, (other than a negotiable promissory note or bill of exchange,) which has been assigned, in the name of the assignor for the benefit of the assignee, the defendant can set off only such demands as existed against the assignor, and in good faith belonged to the defendant at the time of the assignment. Demands subsequently acquired cannot be set off, although the defendant became the holder of

(*t*) Ladue v. Hart, 4 Wend. 583.
(*u*) Sears v. Patrick, 23 id. 528.
(*v*) Warner v. Barker, 3 id. 400.

them without notice of the assignment.(*w*) In this case the court remark that the distinction made in this subdivision of the section "is new, and the reason for it not obvious, where the defendant has *purchased* the demand with a view to apply it in satisfaction of a demand held against him. The time when it accrued does not seem at all important in balancing the equities of the parties. The fault lies rather with the *assignee* in not giving previous notice of the assignment; thereby leaving the defendant to believe the plaintiff to be still the owner of the demand. The language of the statute, however, is explicit, and the rule imperative upon the courts."

In the case of *Gould* v. *Chase*(*x*) it was held that where A. gives a note not negotiable, which is assigned, and he afterwards promises to pay the note to the assignee, A. cannot set off a demand against the payee which arose before the giving of the note, though the suit be brought in the name of the payee; for it is to be presumed from his giving the note, (and his promise renders the presumption irresistible) that such set off had been paid or satisfied; especially in the absence of all explanation.(*y*)

A bond executed by the plaintiff and assigned to the defendant by the obligee before the commencement of the action is within the statute, and may be set off.(*z*)

(*w*) Mead v. Gillett, 19 Wend. 397.
(*x*) 16 John. 226.
(*y*) See also Henry v. Brown, 19 id. 49.
(*z*) Tuttle v. Beebe, 8 id. 152.

In an action brought by an assignee of all the choses in action of another, to recover the surplus of moneys received by the defendant on a note transferred to him by the assignor as collateral security for the payment of a debt due to him, the defendant cannot set off a note given by a firm of which the assignor was a partner; although the notes and accounts of the firm have been transferred to him and he has undertaken to pay the debts of the copartnership.(1)

Demands against assignor of notes or bills.] Under the subdivision of the section of the statute which relates to set off against the assignor of notes or bills of exchange, if a negotiable promissory note be given by A. to B. which after maturity, is assigned or transferred by B. to C. and by C. to D.; in a suit on such note in the name of D. against A. he may set off, to the amount due on the note, only, either 1st, a demand against B. the payee, which was in existence at the time of the assignment or transfer of the note by B. to C., and which, if it were not originally due to A. had been at that time assigned to him; or 2d, he may set off a demand against C. which was in existence at the time of the assignment or transfer by C. to D., and which, if it were not originnally due to A. had been at that time assigned to him; or 3d, he may set off the whole of a demand against D., the plaintiff, which was in existence at the time of the commencement of the suit, and then belonged to A. either as the original creditor or as

(1) Sears v. Patrick, 23 Wend. 46.

the assignee thereof. But if the note had been transferred by B. to C. before it became due, and by C. to D. after it became due, then in a suit in the name of D. against A. no set off could be made of a demand against B. but a set off could only be made of a demand against C. or D. as above stated. So if the note had been assigned by both B. and C. before it became due, no set off could be made, except of a demand against D.(*a*)

It was well settled, previous to the adoption of the revised statutes, that where a note is endorsed after it is due, the indorsee takes it subject to all the equity and to every defence, including the right of set-off, which existed against it in the hands of the original payee.(*b*)

The following cases, which have been decided by the supreme court, will more fully illustrate this provision of the statute.

In the case of *Driggs* v. *Rockwell*,(*c*) it was decided by the court for the correction of errors, that in an action upon a negotiable promissory note assigned after maturity, a set-off, to the amount of the plaintiff's debt, may be made of a demand existing against the assignor, provided it be such as might have been set off against the assignor,

(*a*) Edw. Tr. 3d ed. 61.

(*b*) O'Callaghan v. Sawyer, 5 John. 118. Furman v. Haskin, 2 Caines, 372. Hendricks v. Judah, 1 Johnson, 319. Lansing v. Gaine, 2 id. 300. 3 T. R. 80. Sanborn v. Little, 3 New Hamp. Rep. 539. See 2 Dev. & Bat. 283.

(*c*) 11 Wend. 504.

while the note belonged to him; or if the suit be in the name of a plaintiff who has no real interest in the contract upon which the suit is founded, so much of a demand existing against the party whom the plaintiff represents, or for whose benefit the action is brought, may be set off as will satisfy the plaintiff's debt. And such a right of set-off existed as well before as since the revised statutes.

Where the plaintiff buys a negotiable note after it falls due, he should give immediate notice to the maker, the same as if he had bought any other chose in action not negotiable; for being overdue it stands on precisely the same ground, and should the maker acquire any set-off against the payee, or other person transferring such dishonored note, before notice of the transfer to the maker; as if he should get hold of a note or other chose in action against the payee, or have dealings with him, and thus acquire a right of set-off, he may avail himself thereof, either to defeat the plaintiff's recovery entirely, or diminish it according to the amount claimed as a set-off, unless he have previous notice that the plaintiff is the holder; and this even though such matter of set-off arose long after the plaintiff acquired both the legal and equitable interest in the note which he holds.(*d*)

Though a note be transferred after it falls due, the

(*d*) Benedict v. Dix, in Sup. Court, 1817, M. S. cited Cow. Tr. 2d ed. 742. Sargent v. Southgate, 5 Pick. 312. 6 id. 355.

maker is not entitled to set off a demand against the payee, if, at the time of the transfer, the payee has other demands against the maker to an amount sufficient to exhaust the demands sought to be set off. And where the maker of two notes has a demand against the payee sufficient to extinguish one of them, and the payee transfers one of them after its maturity, the other being sufficient to meet the demand of the maker, and subsequently the second note is transferred also after its maturity; *it seems* the holder of the former note would be entitled to recover the whole amount of it.(*e*)

Where a note is transferred by the payee for a valuable consideration, before maturity, and an action is brought thereon in the name of the holder, for his own benefit, the defendant cannot set off a demand against the payee;(*f*) unless he show that the note was transferred for the purpose of defrauding him of his set-off.(*g*) And it was also decided in the case of *Smith* v. *Van Loan*, above referred to, that in an action by a *bona fide* holder of a note, obtained before maturity, by transfer, the maker cannot set off any demand he had against the payee at the time of the transfer, although the note was accepted by the holder in payment of a precedent debt; unless the note was originally made for the accommodation of the payee, or was satisfied whilst in his hands, and fraudulently put into circulation

(*e*) Collins v. Allen, 12 Wend. 356.
(*f*) Smith v. Van Loan, 16 Wend. 659.
(*g*) Hendricks v. Judah, 1 John. 319. See Richter v. Selin, 8 Serg. & Rawle, 425.

by him. Even then the set-off is not allowable if the holder can prove that he received it in the usual course of trade, paid value, parted with property, or gave credit on the faith of the paper at the time of the transfer.

In a case where the defendant purchased a judgment against O., who then held, as payee, a promissory note of the defendant, and O. afterwards, and after the note was due, transferred the note to the plaintiff; it was held that the defendant might set off the judgment in a suit brought by the plaintiff on the note.(*h*)

Where, in a suit by the holder of a promissory note, the defendant pleaded a set-off, averring that the note was the property of the payee, that the plaintiff was a mere nominal party, and that the note was transferred to him for the purpose of depriving the defendant of his set-off; and the plaintiff replied simply that the note was his property, and not the property of the payee, without traversing the corrupt transfer of the note; it was held that by the pleadings the plaintiff was to be considered as having admitted the corrupt transfer of the note and the existence of the set-off.(*i*)

In an action by an endorser of a promissory note against the maker, the latter will not be allowed to prove a set off

(*h*) Ford v. Stuart, 19 John. 342.
(*i*) Savage v. Davis, 7 Wend. 223.

against the original payee, unless he previously show that the note was transferred after it became due, or for the purpose of defrauding the maker of his set off.(*k*) So a note endorsed after it has become due, cannot be set off, in an action brought against the endorsee by the assignee of the maker.(*l*)

A commission of bankruptcy is legal notice to affect the subsequent assignee of a promissory note, with the statute right of set off.(*m*)

It has been decided in Alabama that where a person makes a promissory note negotiable at a bank, and the bank becomes its purchaser, no set off can be allowed against it in favor of the maker against the payee. And this is upon the ground that in such a note the maker impliedly stipulates that he will forego every defence against the payee and all intervening holders; and that it would be a fraud on the bank to set up an off set under such circumstances.(*n*)

A defendant sued on a note may plead, as a set off, a note against an intermediate assignor, which note was assigned to him while the note sued on belonged to such intermediate assignor.(*o*)

(*k*) Hendricks v. Judah, 1 John. Rep. 319.
(*l*) Anderson v. Van Allen, 12 id. 343.
(*m*) Humphries v. Blight's Assignees, 4 Dall. 370.
(*n*) Emanuel v. Atwood, 6 Porter, 384.
(*o*) Tripplett v. Bradley, 6 Monro, 355. Stewart v. Anderson, 6 Cranch, 204.

Demands against persons beneficially interested in the suit.] By the act respecting set offs which existed in this state previous to the adoption of the revised statutes the rights of *cestuis que trust*, or persons beneficially interested, were left unprovided for. It was, therefore, decided by the supreme court in the case of *Wheeler* v. *Raymond*,(*p*) that in an action on a judgment, in the name of the judgment creditor, for the benefit of an assigneee of the judgment, the defendant could not set off a debt due to him from the assignee. The provision of the revised statutes on this subject, which we have given above, was designed to supply this defect in the previous statute. This provision of the revised statutes is in accordance with the English decisions. Thus in the case of *Coppin* v. *Craig*,(*q*) it was held by the court of common pleas in England, that in a suit by an agent, in his own name for a debt due to his principal, any debt due from such principal to the party sued might be the subject of a set off.(*r*) And so where the plaintiff is a mere nominal party, having assigned the claim sued for to a third person, the defendant may set off a claim due to him from the assignee or person beneficially interested.(*s*)

But where the plaintiff sues merely as the agent or trus-

(*p*) 5 Cowen, 231.

(*q*) 7 Taunt. 243.

(*r*) See also Jarvis v. Chapple, 2 Chit. Rep. 387. Winchester v. Hacklay, 2 Cranch, 342.

(*s*) Winch v. Keeley, 1 T. R. 621, 2. Crosse v. Smith, 1 Maule & Sel. 545. 2 Cranch, 342.

tee of a third person, and it was known to the defendant, at the time when he entered into the contract which is the subject of the suit, that the plaintiff acted in that capacity, it is well settled that he cannot set off a demand due to him *from the plaintiff*.(*t*) And it is not necessary that the defendant should have had express notice of the trust. An implied notice is sufficient.(*u*) Neither can the purchaser of goods avail himself of a set off against the agent, in an action by the *principal*, if he knew at the time of making the purchase, that he was dealing with an agent.(*v*) And so where one partner delivers partnership property to a third person, who, knowing it to be partnership property, receives it in payment of his individual debt due from the partner delivering it to him, in an action by and in the name of all the partners against such creditor of the individual partner, for the price of the goods, the debt of the one partner is not a defence or set off against all the partners.(*w*)

But where a factor, dealing for a principal, delivers goods in his own name, without disclosing the name of his principal, the person contracting with him has a right to consider him, to all intents and purposes, as the principal; and though the real principal may appear and bring an ac-

(*t*) Gordon v. Church, 2 Caines, 299. Wilson v. Codman's Ex'r, 3 Cranch, 193. Browne v. Robinson, 2 Caines' Cas. in Er. 341.

(*u*) Anderson v. Van Allen, 12 John. 343.

(*v*) Browne v. Robinson, 2 Caines' Cas. in Er. 341. 3 Cranch, 193.

(*w*) Dob v. Halsey, 16 John. 34.

tion upon the contract against the purchaser of the goods, yet the purchaser may set off any claim he may have against the factor, in answer to the demand of the principal.(x)

In Kentucky, the law upon this subject is the same as it is here. Thus, it has been held in that state, that a debt due to the defendant by a person for whose benefit the suit is prosecuted, may be pleaded as a set off.(y)

This branch of the subject will be noticed more fully when we come to consider between what parties a set off may be had.

Demands against insolvent, imprisoned, absent, concealed or absconding debtors.] The cases in which set offs are allowed to be made, by the chapter of the revised statutes referred to in the section above quoted, are limited to suits brought by assignees, and to instances where the debt was owing to the defendant before the first publication of the notice required in the first article of the title of the statute relating to the assignment of the estates of non-resident, insolvent, &c. debtors,(z) or before the appointment of trustees under the second article, or before the presenting the petition of the insolvent under the third, fifth and sixth ar-

(x) Rabone v. Williams, 7 T. R. 360, n. (a), 361, n. (c).
(y) Ward v. Martin, 3 Munro, 19.
(z) 2 R. S. 1.

ticles, or before the publication of notice to creditors under the fourth article.(*a*)

And where the defendant buys a note after it is due, this circumstance is such constructive notice to him of the insolvency of the maker, that he cannot set it off in an action brought in the name of the maker, who had become insolvent, by the assignees of his property in trust for his creditors;(*b*) for the note being over-due, was held sufficient to put the defendant on inquiry relative to the maker's circumstances, and therefore equivalent to actual notice.(*c*)

There is one exception to the general rule above laid down, that where there are several defendants the demand must be due to all of them jointly. In suits on bills of exchange and promissory notes, the plaintiff is authorized, by statute, instead of bringing separate suits against the drawers, makers, endorsers and acceptors, to include all or any of such parties to the bill or note in one action, and to proceed to judgment and execution in the same manner as though all the defendants were joint contractors.(*d*) And in any such action any person or persons sued may set off his or their demands against the plaintiff, in the same man-

(*a*) 2 R. S. 14, 15, 28, 31, 24. 2 R. S. 42, § 7.

(*b*) Johnson v. Bloodgood, 1 John. Cas. 61; S. C. 2 Caines' Cas. in Er. 303. Ogden v. Cowley, 2 John. 274.

(*c*) Id. Anderson v. Van Allen, 12 John. 343.

(*d*) 2 R. S. 2d ed. 274, § 6.

ner as if such defendant or defendants had been sued in the usual manner.(*e*)

4th. If there are several defendants, the demand must be due to all of them jointly.(*f*)

One of several defendants cannot set off a debt due to him alone, from the plaintiff, against a joint debt.(*g*) Nor can a debt due to the defendant and another or others, jointly, be set off against a debt due from the defendant alone;(*h*) unless there be an agreement between the parties that such set off be allowed;(*i*) or there has been a clear series of transactions in which joint credit has been given.(*k*) Nor can a debt due from the plaintiff and another to only one of several defendants be set off.(*l*) But a debt on a joint and several bond may be set off in an action brought by only one of the obligors.(*m*) So where the plaintiff owes a debt to several persons jointly, one of whom owes him, the latter may acquire the right of set

(*e*) 2 R. S. 375, § 9.

(*f*) Id. 354, § 18, sub. 6. 4 Dev. 419.

(*g*) Chitt. on Cont. 664. Warner v. Barker, 3 Wend. 400. 6 Cowen, 261. Banks v. Pike, 15 Maine Rep. 268.

(*h*) Shannan v. Crosby, 11 John. 70. Murray v. Toland, 3 John. Ch. Rep. 573. Tuckers v. Oxley, 5 Cranch, 34. 1 Wash. 79. 5 Munf. 388. Ex parte Ross, Buck, 125.

(*i*) Kinnersley v. Hossack, 2 Taunt. 170.

(*k*) Vulliamy v. Noble, 3 Mer. 618.

(*l*) Wolf v. Washburn, 6 Cowen, 360.

(*m*) Fletcher v. Dyke, 2 T. R. 32.

off against the plaintiff by taking an assignment to himself alone, of the debt due from the plaintiff, before the plaintiff's suit is commenced.(*n*)

An allegation of an agreement to set off a specific joint debt against specific separate debts previously accrued, is in substance proved by evidence of an agreement, prior to the debts accruing, to set off all joint debts that should thereafter arise, against all separate debts.(*o*)

5th. The demand must be liquidated, or for property sold, money paid, or services done.

The statute declares that the demand attempted to be set off "must be a demand for real estate sold, or for personal property sold, or for money paid, or services done; or if it be not such a demand, the amount must be liquidated, or be capable of being ascertained by calculation."(*p*)

This subdivision of the 18th section of the revised statutes was intended to embrace that class of demands which are usually recoverable under the common counts, as well as others in which the amount of the demand is liquidated,

(*n*) Martin v. Williams, 17 John. 330.
(*o*) Kinnerley v. Hossack, 2 Taunt. 170, n.
(*p*) 2 R. S. 354, § 18, sub. 3.

or is capable of being ascertained by mere computation. The language made use of in the statute should not, therefore, be so construed as to destroy the right of set off in such cases, as it existed under the English statutes and our own.(q)

It seems that under the clause of the above section of the statute which permits a set off of a demand for *money paid*, a claim for *money had and received* is a proper subject of set off; although the amount is to be ascertained by the evidence given at the trial, and not by mere computation. It was so previous to the revised statutes, and the law in this respect was not intended to be altered in the revision of 1830. The case was intended to be provided for in one of the expressions adopted from the laws of Massachusetts, in the above subdivision. The expressions used in the law of Massachusetts are, "the defendant may give in evidence, upon the general issue, his or her demands against the plaintiff for goods delivered, monies paid, or services done," &c.(r) And under the provision for allowing the defendant to offset a demand for moneys paid, the supreme court of Massachusetts have decided that the defendant might offset a demand for money had and received by the plaintiff, or paid to him by another person for the plaintiff's use.(s) The same court has also decided, that board and lodging, washing, &c. were all in-

(q) Per Chan. Walworth, Downer v. Eggleston, 16 Wend. 60.
(r) Id. 59.
(s) See Richards v. Blood, 17 Mass. Rep. 66.

cluded within the meaning of the terms goods delivered and services performed.(*t*)

The demand first mentioned, in the above subdivision of the statute, must be one for which debt or *indebitatus assumpsit* might be sustained at common law; as, for the consideration money of land sold, an action to recover which may be sustained, although the conveyance contain the usual receipt of payment, if it be proved by parol that payment was not in fact made.(*u*) And such demand may be set off although the amount be unliquidated, or not ascertained by the parties. Any other demand arising on contract may also be set off, if the amount be liquidated, or if the amount be capable of being ascertained by calculation merely; as a bill of exchange or promissory note for the payment of money; or a written contract for a sum certain, though payable in specific articles, at a value or price stipulated in the contract.(*v*)

As respects a set off of unliquidated demands, the course of legislation in this state has been rather fluctuating. By the act of 1801, unliquidated demands could not be set off. By the revised laws of 1813, a set off was allowed in all cases where two or more persons dealing together were indebted to each other, or had demands arising on contracts, or credits against each other. That was general, and re-

(*t*) Witler v. Witler, 10 Mass. Rep. 223.

(*u*) See Shepherd v. Little, 14 John. 210. Id. 165, per Thompson, Ch. J. ¦Bowen v. Bell, 20 id. 338.

(*v*) Edw. Tr. 3d ed. 60.

lated to contracts generally. By the above section of the revised statutes it will be seen, that set offs are now limited to contracts of certain descriptions; and if they are not such, then the amount must be liquidated, or be capable of being ascertained by calculation. The law is thus restored, as it was in 1801, and conforms to the English statutes of set off.(*w*)

A debt is liquidated when it is evident that it is due, and to what extent. *Cum certum est, an et quantum debeatur.*(*x*)

The rule is well settled at common law that unliquidated damages are not the subject of set off.(*y*) And this rule, with occasional modifications, prevails, either by the common law or by statute, in most of the states of the American union. In *Virginia* this is the rule, both at law and in equity.(*z*) In *Massachusetts* it has been held, that a claim for damages arising from negligence, or unfaithful management of merchandize consigned to the plaintiff for sale, could not be set off under the statute of that state.(*a*)

(*w*) See 15 Wend. 560. Reab v. McAlister, 8 id. 109. Butts v. Collins, 13 id. 139, 143. Revisers Notes to ch. 6 of pt. 3, p. 17, R. S.

(*x*) 1 Poth. on Oblig. 592.

(*y*) 1 Selw. N. P. 4th Am. ed. 137. 1 Esp. N. P. 278. Brown v. Cuming, 2 Caines, 33. Duncan v. Lyon, 3 John. Ch. R. 351. 6 T. R. 488. 1 Cowp. 56. 4 John. Ch. R. 292. 8 Cowen, 310. 2 John. 155. 11 id. 494.

(*z*) Webster v. Couch, 6 Rand. 519.

(*a*) Adams v. Manning, 17 Mass. R. 178.

In *New-Jersey*, also, unliquidated damages cannot be set off.(*b*) Such is the law also in *North-Carolina*,(*c*) and in *Kentucky*,(*d*) *Connecticut*,(*e*) *Vermont*,(*f*) *Maryland*,(*g*) *Tennessee*,(*h*) and *Indiana*.(*i*)

In *Pennsylvania*, it was laid down in an early case that unliquidated damages in covenant, sounding in tort, could not be set off under the plea of payment to debt on bond.(*k*) And the rule has since been recognized in another case.(*l*) So it has been held that a claim for damages, arising from the misconduct of the plaintiff as factor, cannot be set off.(*m*) In another case in that state, the drawer of a protested bill, who had paid the 20 per cent. damages, was not allowed to set them off against the acceptor of the bill, on the ground that they were unliquidated.(*n*) In a late case, however, the supreme court of that state held that unliquidated damages, arising from deficiency in the per-

(*b*) Edwards v. Davis, 1 Halst, 104, 394. Smock v. Worford, 1 South. 306.

(*c*) Hogg's Ex'rs v. Ashe, 1 Hayw. 471. S. C., Conf. R. 3.

(*d*) Morrison's Ex'r v. Hart, Hardin, 150. Williams v. Gilchrist, 3 Bibb, 49. Collins v. Farquar, 3 Monroe, 87. Tribble v. Taul, 7 Monroe, 455.

(*e*) Shepard v. Tomlinson, 2 Swift's Dig. 149.

(*f*) Nims v. Rood, 11 Verm. Rep. 96.

(*g*) Dyer v. Dorsey, 1 Gill & John. 440.

(*h*) Ragsdale v. Buford's Ex'rs, 3 Hayw. 192.

(*i*) McKinney v. Bellows, 3 Blackf. 31. Jones v. McGrew, 1 id. 192.

(*k*) Kachlin v. Mulhallon, 2 Dall. 237. 1 Yeates, 571.

(*l*) Carrell v. Green, 10 Serg. & Rawle, 14.

(*m*) Gorbier v. Emery, 2 Wash. C. C. Rep. 413.

(*n*) Armstrong v. Brown, 1 id. 43.

formance of a contract for the erection of a building, may be given in evidence as a set off against the plaintiff's claim under a mechanic's lien, but will not authorize the jury to find a balance in favor of the defendant.(*o*) And in another case it was held, that under the defalcation act of that state, upon a plea of payment or set off, a claim for unliquidated damages may be given in evidence against the plaintiff, in an action of debt, when it arises from the same transaction as that on which the suit is brought.(*p*) It has also been decided in several cases, by the courts of Pennsylvania, that a defendant may give evidence of acts of nonfeasance or misfeasance by the plaintiff, where these acts are immediately connected with the plaintiff's cause of action; though it should be observed the evidence has been said to be admissible, not by way of set off, but for the purpose of defeating, in whole or in part, the plaintiff's action.(*q*)

In *South-Carolina* it has been held, under the provisions of the statute of that state, that a defendant may set off unliquidated damages arising from the non-performance by the plaintiff of a contract for building a house, against the plaintiff's demand for work and labor.(*r*)

(*o*) Bayne v. Gaylord, 3 Watts, 301.

(*p*) Hubler v. Tamney, 5 Watts, 51.

(*q*) See 1 Serg. & Rawle, 477. 4 id. 249. 5 id. 117. 11 id. 280. 12 id. 275, 431.

(*r*) Cook v. Rhine, 1 Bay, 16. Farron v. Hays, 1 Nott & McC. 312.

Unliquidated damages are very clearly and accurately defined by Mr. Senator Maison in the case of *Butts* v. *Collins*, in the court of errors of this state.(*s*) He observes: "Unliquidated damages are such as rest in opinion only, and must be ascertained by a jury; their verdict being regulated by the peculiar circumstances of each particular case. They are damages which cannot be ascertained by computation or calculation—as, for instance, damages for not using a farm in a workmanlike manner; for not building a house in a good and sufficient manner; on warranty in the sale of a horse; for not skilfully amputating a limb; for carelessly upsetting a stage, by which a bone is broken; for not making repairs to a dwelling house; for unskilfully working raw materials into a fabric; and other cases of like character, where the amount to be settled rests in the discretion, judgment or opinion of the jury. Hewlett v. Strickland, 1 Cowp. 56. Freeman v. Hyatt, 1 W. Black. 394. Weigall v. Waters, 6 T. R. 488. Livingston v. Livingston, 4 John. Ch. R. 287. Hepburn v. Hoag, 6 Cowen, 613. In these, and the like cases, there is no data given for computation; nor can the damages be ascertained by any mode of calculation. It is otherwise as to the amount due on a note; or on a merchant's account; or for work, labor and services; or for a yard, a piece, or a bale of flannel. The damages in such cases can be readily ascertained by calculation."

The following cases will show what demands may be

(*s*) 13 Wend. 139, 156.

set off, and what demands are considered so far unliquidated as to be incapable of being set off.

Compensation for the part performance of a contract by a defendant cannot be set off against the damages of the plaintiff occasioned by the non-performance of the residue; and it was accordingly holden, where one party agreed to saw, by a given time, 300,000 feet of boards, at a stipulated price per 1000 feet, and failed to saw the whole quantity; that though he had sawed 144,000 feet, which had been received by the other party, a compensation for the quantity sawed could not be set off against the claim for damages for the omission to saw the residue.(*t*)

In an action of covenant, unliquidated damages, arising from the breach of other covenants to be performed by the plaintiff, cannot be pleaded by way of set off.(*u*) Thus, in an action of covenant for rent by a landlord, the defendant cannot set off any uncertain damages that he may be entitled to recover against the landlord on any of the other covenants in the lease. The covenant to pay rent is absolute, and if the tenant sustain any injury from the act of the landlord, he may have his remedy by cross action.(*v*)

If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time

(*t*) Stephens v. Beard, 4 Wend. 604.

(*u*) Howlett v. Strickland, Cowp. 56.

(*v*) Weigal v. Waters, 6 T. R. 488. Sickels v. Fort, 15 Wend. 559. Tuttle v. Tompkins, 2 id. 407.

afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with a condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished at the time; such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by the obligee in an action brought against him by the obligor who executed.(*w*)

In an action of covenant for not indemnifying a person against taxes, no plea of set off can be sustained.(*x*)

So a guaranty to the amount of a certain sum of money given for a third person, cannot be set off.(*y*) Neither can a guaranty against contingent damages, which cannot terminate in a debt.(*z*)

Nor can damages not yet recovered be set off.(*a*) In an action by a servant against his master, for wages, the latter cannot, generally, set off the value of goods lost by the negligence of the former. But if it be proved to have been part of the original agreement between them that the servant should pay, out of his wages, for his master's goods

(*w*) Fletcher v. Dyche, 2 T. R. 62.
(*x*) Cooper v. Robinson, 2 Chit. 161.
(*y*) Crawford v. Sterling, 4 Esp. 207. Morley v. Inglis, 6 Dowl. P. C. 202. 5 Scott, 314.
(*z*) Sampson v. Burton, 4 Moore, 516.
(*a*) Freeman v. Hegett, 1 W. Black. 394; S. P. Cowp. 56.

lost through his negligence, the value of the goods so lost, may, under the general issue, be deducted from the amount of the wages.(*b*)

Where in an action for work and labor the defendant attempted a set off, by showing that the plaintiff had undertaken to insure certain goods and chattels, the property of the defendant, but that the plaintiff had neglected to fulfil his engagement, in consequence of which the defendant had sustained a considerable loss, the court of common pleas in England, held that this could not be made the subject of a set off; but that the defendant must seek his remedy by a distinct action.(*c*)

Nor can an injury done to goods delivered to the plaintiff to be conveyed for hire, be set off in an action brought for the freight of the goods.(*d*) Where an action was brought for freight, and a cross action for unliquidated damages, against a foreign seaman, the court refused to permit the freight to be paid into court as a fund, liable to the payment of the damages when ascertained.(*e*)

Where the plaintiff declared in covenant for a total loss on a policy of assurance effected in his own name, and in one count averred the interest to be in himself, and in

(*b*) Le Loir v. Bristow, 4 Camp. 134.
(*c*) Gillett v. Mawman, 1 Taunt. 137.
(*d*) Dowsland v. Thompson, 2 W. Black. Rep. 910.
(*e*) Sherborne v. Siffkin, 3 Taunt. 525.

another, in himself and others; to which the defendants pleaded that a less sum was due on the policy than for a total loss, and set off monies due to them on the plaintiff's bond, which was made to them before they had notice that any other than the plaintiff was interested in the policy, the pleas were held bad.(*f*)

And unliquidated damages for a breach of warranty on the sale of an article, cannot, in any event, be given in evidence simply as a set off under the statute, in an action by the vendor for the price of the article.(*g*)

It was held in the case of *Rose* v. *Sims*,(*h*) that a contract to indorse a bill of exchange was not a subject of mutual credit, so as to admit of a set off, as the damages were unliquidated. "For an *indorsement* would not necessarily have terminated in a *debt*, as the acceptor would have been the debtor, and the indorser a guarantee only."(*i*)

So where, in an action for money due for a parcel of cloth, a motion was made to stay the trial of a cause, in order that a commission might be sent into Portugal, for the purpose of enabling the defendant to establish, by way

(*f*) Grant v. Royal Exchange Ass. Co. 5 Maule & Sel. 439.

(*g*) Per Chan. Walworth, in Reab v. McAlister, 8 Wend. 115. A different rule prevails in Pennsylvania. See Steigleman v. Jeffries, 1 Serg. & Rawle, 477.

(*h*) 1 Barn. & Adol. 526.

(*i*) Per Tindal, C. J., 1 Hodges, 143.

of set off, the fact that in a former parcel of cloths sent to Portugal, and bought of the same plaintiff, it appeared on opening the bale, that they were burnt in the pressing, which had greatly lowered their value. In opposition to this motion it was objected that the set off was not maintainable, and that the defendant should bring a special action on the case, for the damage of which he complained; and the court being of this opinion, the motion was refused.(*k*)

In the case of *Bornman* v. *Tooke*,(*l*) a similar doctrine was held. This was an action of assumpsit for freight upon a cargo of timber. The freighter agreed to load his ship with the greatest expedition, and sail with the first fair wind direct to Portsmouth. The ship arrived and the cargo was delivered. The plaintiff brought his suit for the specific freight agreed upon. The defendant claimed damages because the ship had not sailed direct to Portsmouth. It was held that as there was a specific agreement for specific freight, the defendant should bring his cross-action for any damages he might have sustained by the default of the plaintiff.

In *Watts* v. *Coffin*,(*m*) it was held that the violation of the covenant on the part of the grantor, to allow common of pasture and of estovers, was no defence to an action for

(*k*) Freeman v. Hyett, 1 Black. 394.
(*l*) 1 Esp. N. P. 278.
(*m*) 11 John. 494.

rent. And it was there said that there never was a case of set-off in equity where the damages proposed to be set off against a clear and certain debt were unliquidated, and depended upon an unsettled legal right, of doubtful aspect.

And it seems that whether the set-off does or does not arise out of the same transaction as the plaintiff's claim, does not vary the case. It must be a liquidated demand and used as a set-off, and cannot be used as evidence in bar of the suit.(*n*)

But although a demand be unliquidated, yet it may be set off; *provided it is capable of being reduced to a certainty or ascertained by calculation.* Thus, in an action by the assignees of a bankrupt for not accepting a bill of exchange pursuant to an agreement entered into by the defendant with the bankrupt, on balancing accounts, no special damage being alleged in the declaration, the court held that the defendant might set off a debt due to him from the bankrupt before the bankruptcy; for as no special damage was incurred, the demand of the plaintiffs, though unliquidated at the moment, was capable of being reduced to a certainty by a simple calculation, viz. the amount for which the bill was drawn, together with interest due upon it, if the time of payment was passed; or the amount of the bill *minus* the discount, if the bill was not then due.(*o*)

(*n*) See opinion of Senator Todd, Reab v. McAlister, 8 Wend. 124. See also Steigleman v. Jeffries, 1 Serg. & Rawle, 477.

(*o*) Gibson v. Bell, 1 Hodges, 136. 1 Bing. N. C. 743.

In an action for services performed by plaintiff as housekeeper and for goods sold and delivered, evidence of the plaintiff's acts of malfeasance in embezzling the defendant's property, is inadmissible by way of set-off, but may, by leave of the court, be proved on the plea of *non-assumpsit* and payment.(*p*)

In this state it has been decided, that debtors to a bank may offset its bills or notes in an action brought by it against them. And the refusal of the bank to pay in specie, and the consequent stoppage of the payment of its bills, will not prevent a *bona fide* purchaser or holder, after that time, from setting off such bills in a suit brought by the bank.(*q*) The contrary doctrine, however, has been held in Massachusetts. And the court there puts its decision upon the ground that such bills are only a ground of action, and that nothing is a lawful tender but gold and silver.(*r*) In the case above referred to, of the *Jefferson County Bank* v. *Chapman*, the question was raised whether in a suit brought by a bank against a holder of its notes, a previous demand of payment of such notes at the bank was requisite, to enable such holder to set off the notes; but the question was not decided by the court.

Where the right to such a set-off against a bank exists at the time it stops payment, such right will not be affected

(*p*) Heck v. Shever, 4 Serg. & Rawle, 249.

(*q*) Jefferson County Bank v. Chapman, 19 John. 322. Miller v. Receiver of the Franklin Bank, 1 Paige, 444.

(*r*) See Hallowell and Augusta Bank v. Howard, 13 Mass. R. 235.

by the appointment of a receiver. Therefore if the receiver is compelled to resort to an endorser, where the real debtor is unable to pay, such endorser can set off the bills of the bank which he had at the time it stopped payment, unless he is indemnified by the real debtor.(*s*) But where bills of a bank are obtained by one of its debtors after it stops payment, they cannot be set off by such debtor against the debt he owes the bank.(*t*)

One partner cannot set off a debt due to him from another on the partnership account, unless a final balance has been struck and agreed to between the parties.(*u*)

In an action brought to recover damages for the defendant's negligence in keeping the plaintiff's sheep, founded on the breach of a special contract, the defendant cannot set off his claims for keeping them. They are the subject of a distinct action.(*v*)

A penalty cannot, in general, be pleaded by way of set-off.(*w*) Therefore where A. and B. entered into an agreement, for the true performance of which each party bound himself to the other in the penal sum of 500*l*. to be recoverable on breach of the agreement, in a court of law,

(*s*) Matter of the Receiver of the Middle District Bank, 1 Paige, 585.

(*t*) Id. ib.

(*u*) Fromont v. Coupland, 2 Bing. 170; 9 Moore, 319, S. C.

(*v*) Crowninshield v. Robinson, 1 Mason, 93.

(*w*) Nedriff v. Hogan, 2 Burr. 1024.

and by way of liquidated damages, it was held, in an action by B. against A. for a breach of the agreement, that the 500*l.* was a penalty, and that B. could not plead it by way of set-off as liquidated damages.(*x*) But where in articles of agreement for repairing a warehouse, for a fixed price, it was stipulated that, in the event of the work not being completed in three months, the builder should forfeit to his employer a penalty of 5*l.* for every week, to be deducted from the amount due at the completion of the work; it was held, in an action brought by the builder for *extra work*, that the employer was entitled to set off the penalty; and that he had a double remedy, either to deduct or recover it.(*y*) By statute, in this state, if the demand to be set off is founded upon a bond or other contract having a penalty, the sum equitably due by virtue of its condition, only, shall be set off.(*z*)

6th. *The demand must have existed and have belonged to defendant when the suit was commenced.*(*a*)

Thus were the defendant had made a conditional bargain with a third person for the purchase of a note against the plaintiff, but the agreement was never executed till the

(*x*) Davis v. Penton, 9 Dow. & Ry. 369. 6 Barn. & Cress. 216.

(*y*) Duckworth v. Alison, 1 Mee. & Wels. 412.

(*z*) 2 R. S. 354, § 18, sub. 1.

(*a*) 2 R. S. 354, § 18, sub. 4. Carpenter v. Butterfield, 3 John. Cas. 145. Holden v. Gilbert, 7 Paige, 208. Tuttle v. Beebe, 8 John. 181. 3 T. R. 186. Braithwaite v. Colman, 4 Nev. & M. 654. 1 Munf. 529; 9 Watts, 126. 2 Bibb, 86.

suit was brought, it was held that it was not such a subsisting debt as could be set off.(*b*)

It is no objection to a set off, however, that the debt proposed to be set off accrued to the defendant subsequent to the time when the plaintiff's cause of action arose, provided it accrued previous to the commencement of the suit.(*c*)

To authorize a defendant to set off a demand against the plaintiff, such demand must not only have been due to him from the plaintiff at the time the suit was brought, but it must be due at the time of the plea pleaded.(*d*) And it must be so stated in the plea. Therefore a plea of set off which states that "before and at the time of the commencement of the action, the plaintiff was indebted to the defendant," &c., without adding "and still is indebted," is bad on demurrer.(*e*) So a plea stating that the plaintiff was indebted to the defendant at the time plaintiff declared, or at the time of the plea pleaded, would be bad on general demurrer.(*f*)

A judgment recovered by the defendant after the commencement of the plaintiff's action cannot be set off;

(*b*) Shepherd v. Turner, 3 McCord, 249.

(*c*) Cornforth v. Rivett, 2 Maule & Sel. 510. Eland v. Karr, 1 East, 375. Fair v. McIver, 16 id. 138.

(*d*) Braithwaite v. Coleman, 4 Nev. & Man. 654. McConnell v. Morrison, 1 Litt. 206.

(*e*) Dendy v. Powell, 2 Lond. Jurist, 352. 3 Mees. & Wels. 442. 6 Dowl. P. C. 577.

(*f*) Evans v. Prosser, 3 T. R. 186.

though it was formerly held otherwise.(*g*) But there is no doubt that a judgment obtained by the defendant prior to the commencement of the plaintiff's action, may be set off, notwithstanding a writ of error is pending on the judgment.(*h*)

An agreement to pay for goods or other property, in ready money, does not deprive the defendant of his right to offset a debt due to himself, which, under other circumstances, would be a proper subject of set off; unless it can be shown that the debt which is sued for in the name of the plaintiff is not in fact his, but in equity belongs to another. Thus, a defendant has a right to insist upon a set off, although he has positively agreed to account for or pay over to the plaintiff moneys which the latter has authorized him to receive as his agent.(*i*) So where the plaintiff, on the 15th of September, had sold goods to the defendant, upon his agreement to pay ready money therefor, and the defendant, at the trial, offered to set off a bill of exchange which had been accepted by the plaintiff, and was payable on the 16th of the same month; the chief justice doubting as to the propriety of the set off, permitted the plaintiff to take a verdict for the whole of his demand, with liberty to the defendant to move to reduce the verdict to the amount due, after deducting the bill of exchange; upon a motion

(*g*) Reynolds v. Beerling, 1 Doug. 112. 4 id. 181. Tidd's Prac. 716.

(*h*) Evans v. Prosser, 3 T. R. 186.

(*i*) Downer v. Eggleston, 15 Wend. 51, 54. Taylor v. Okey, 13 Ves. 180. See Preston v. Shutton, 1 Anst. 50.

for that purpose the rule to reduce the verdict, upon the defendant's delivering up the bill of exchange, was made absolute; Lord Ellenborough and the whole court being of opinion that the set off should have been allowed.(*k*) So, where, in an action of assumpsit for goods sold, the defendants pleaded a set off of the money due on several bills of exchange; to which the plaintiff replied that at the time of the sale of the goods, the defendants agreed to pay for the same in ready money, and to this replication there was a demurrer—the court held that the time of the commencement of the action was the only time to be regarded in reference to the question of set off; and as there was a debt due from the plaintiff to the defendants at that time they were entitled to set it off.(*l*) And in *Lechmere* v. *Hawkins*,(*m*) where the defendant had borrowed money of his debtor, under an express promise to repay it, notwithstanding the previous indebtedness, the counsel for the plaintiff insisted that the defendant could not set off the previous debt, in an action for money lent. But Lord Kenyon said he knew of no such law; that there might be an honorary obligation on the defendant not to insist upon the set off, but the court could not enforce such an obligation, or consider it as binding; that there were mutual demands existing at the time the action was commenced, and such as the statute gave the defendant power to set off against the plaintiff's debt.

(*k*) Cornforth v. Rivett, 2 Maule & Sel. 510.
(*l*) Eland v. Karr, 1 East, 375.
(*m*) 2 Esp. N. P. Rep. 626.

So if a creditor consent that his debtor shall set off the debt against a debt due from the creditor, to another person, it seems that the agreement, although not in writing, is valid.(*n*)

These decisions are in accordance with the doctrine of the civil law; under which it is laid down that even an oath for the performance of an obligation only serves to render the debtor more culpable, if he contravenes it, and to induce him, through the fear of rendering himself guilty of perjury, not to do so; but an obligation thus confirmed remains the same, and the oath does not prevent its being discharged in all the different ways in which obligations may be acquitted; and consequently by compensation.(*o*)

And it has been decided in *Mississippi*, that a set off against a promissory note will not be prevented by inserting the words "without plea or offset" therein; such words not being an essential part of the contract.(*p*)

On the 2d January, 1832, the defendants, who were bankers, received from B. C. a bill of exchange for 760*l.* drawn by M. as his partner, endorsed by him to B. C., and by B. C. to defendants. On the 6th the bill became due, and M. having failed on the same day, the bill was dishon-

(*n*) Coxen v. Chadley, 5 Dowl. & Ryl. 417. 3 Barn. & Cress. 596. 1 Car. & Payne, 174, 478.

(*o*) See 1 Poth. on Oblig. 369.

(*p*) Williams v. Harris, 2 Howard's R. 627.

ored. On the 7th, the defendants, who then had in their hands sufficient assets of B. C. to cover the bill, returned it to B. C. with a receipt for the amount endorsed on it; and having on the 2d entered the bill to the credit of B. C., now entered it as a debit. The defendants were also the acceptors of a bill for 1000*l.* drawn by B. C., endorsed to M., and due on the 12th of January. On the 9th B. C. sent back the 760*l.* bill to the defendants, with instructions to carry into effect views expressed by B. C. in a letter addressed to the defendants on the 6th in anticipation of M.'s failure. That letter was as follows: "We think that you would be entitled to retain the 1000*l.* as a set off for the 760*l.*; at all events we will trust to your doing the best for us in this matter." In an action brought against the defendants by the assignees of M. on the 1000*l.* bill, the jury having found that the transaction between the defendants and B. C. on the 760*l.* bill was closed on the 7th, it was held that they could not set off that bill against the 1000*l.* bill.(*q*)

In accordance with the rule just laid down, there can be no set off in an action brought upon a contract for the sale of goods on credit, for a bill at a certain time, when the action is brought before the expiration of the time which the bill was to run.(*r*) And where A. two months before his death, accepted a bill payable at his bankers in London, which was discounted by them for a customer, who

(*q*) Belcher v. Lloyd, 10 Bing. 310.
(*r*) Hutchinson v. Reid, 3 Camp. 329.

did not endorse it, and they were the holders on the day it became due, on the morning of which they wrote it off, and an hour afterwards received intelligence, by post, of the death of A.; it was held that they were entitled to reimburse themselves out of the funds of A. and pass the amount of the bill to their own account; but the bankers having been in the habit of advancing 1000*l.* to A. by way of loan, for which sum he gave his promissory note, which was renewed every three months, when they debited him with the full discount; it was held, (in an action brought against them by the executors of A. for money had and received) that they could not set off the amount of such note before it became due, upon allowing a rebate of discount for the time it had to run, on the ground that such advance was to be considered as a separate transaction, and not one continued loan, and that no action could be maintained on the note until it became due.(*s*)

Where two actions were brought by and against the same parties, in the first of which the defendant obtained an award in his favor, and in the other the plaintiff obtained a verdict with damages, the court refused to stay proceedings in the first action until a motion for a new trial in the other was disposed of, in order that the damages and costs in the action might be set off against the costs of the other.(*t*)

(*s*) Rogerson v. Ludbroke, 7 Moore, 412. 1 Bing. 93, S. C.
(*t*) Johnson v. Lakeman, 2 Dowl. P. C. 646.

Where a defendant, after a writ issued against him, bought a note against the plaintiff, with the intent to set it off against his debt, our supreme court held such set off inadmissible; for where a right of action is vested, and an action commenced, nothing can deprive the plaintiff of his right to recover, except some act done by himself in relation to that right.(*u*)

The suing out of the writ is the commencement of the suit.(*v*) But where the *capias* was served after the commencement of the term in which it was returnable, and the defendant endorsed his appearance, the plaintiff, in whose name the suit was brought, but for the benefit of an assignee, and without notice to the defendant of the assignment, was not permitted, on an affidavit stating a parol agreement that the proceedings should relate back to the previous term, to enter the defendant's appearance as of that term, thereby to preclude him from making a set off that he would otherwise have been entitled to.(*w*)

It has been held in Pennsylvania, that a bond given by the plaintiff to the defendant, conditioned for the delivery of a certain quantity of goods to a third person, "at any time when called on," cannot be given in evidence as a set

(*u*) Carpenter v. Butterfield, 3 John. Cas. 145. Lowry v. Lawrence, 1 Caines, 71. 19 John. 322. 1 Munf. 529.
(*v*) Lowry v. Lawrence, 1 Caines, 71.
(*w*) Gordon v. Bowne, id. 513.

off without first proving that the delivery of the goods had been demanded.(x)

In England, though an attorney's bill must be delivered a month before he can commence an action for the recovery of it, yet, for the purpose of enabling him to set it off, it is considered to be due at any time. Thus in *Martin* v. *Winder*,(y) a motion was made on the part of the defendant, who was an attorney, for a rule to show cause why the proceedings should not be stayed until his bill should be paid, or till the expiration of a month from the delivery of it, that he might be enabled to set it off; the court held that though an attorney cannot bring an action on his bill till it has been delivered a month, that circumstance is not necessary to enable him to set it off; that he must not produce it at the trial by surprise, but that it is sufficient in such case to deliver it to the plaintiff in sufficient time for him to have it taxed before the trial.

7th. *The demand must not be barred by the statute of limitations.*

A debt barred by the statute of limitations cannot be set off: and if it be pleaded in bar to the action the plaintiff may reply the statute of limitations ;(z) or if given in evi-

(x) Leas v. Laird, 6 Serg. & Rawle, 129.
(y) 1 Doug. Rep. 199, n.
(z) Remington v. Stevens, 2 Strange, 1271. 1 Tidd's Pr. 664. Williams v. Gilchrist, 3 Bibb, 49.

dence on a notice of set off, it may be objected to at the trial.(*a*) And where to a set off pleaded by the defendant the plaintiff took issue upon it, and did not set up the statute of limitations, it was held that though the statute could not, in such a case, operate as a bar, yet that the jury might presume, from length of time and other circumstances, that the debt had been satisfied.(*b*)

It has been decided in North Carolina, that a set off is not barred by the statute of limitations if the statute be not set up in the replication.(*c*)

Where the paymaster of a regiment gave credit on a running account with an officer on a foreign station, for sums of money as an increased pay and allowance, to which, from a misconstruction of a general order he supposed the officer was entitled, and after having been apprised by the board of ordnance that such sums would not be allowed, suffered the officer to remain in ignorance of this fact for four years; it was then held, in an action by the officer's personal representative against such paymaster for pay remaining due, that the paymaster was concluded by the account in which he had erroneously given credit, and that he was not at liberty to set off the latter against the demand.(*d*)

(*a*) Bull. N. P. 180. Turnbull v. Strohbecker, 4 McCord, 210.
(*b*) Cooper v. Turner, 2 Stark. 497.
(*c*) Stanley v. Green, Martin, 60.
(*d*) Skyring v. Greenwood, 6 Dow. & Ry. 401.

Where the grantee of an annuity set aside for defective registry brings an action for money had and received to recover back the consideration money paid for it, the grantor may set off the payments made in respect of such annuity, though for more than six years, unless the plaintiff reply the statute of limitations.(*e*)

Where there are cross demands between parties, which accrued nearly at the same time, both of which would be barred by the statute of limitations, and the plaintiff has saved the statute by suing out process, but the defendant has not, the defendant may nevertheless set off his demand.

Thus in assumpsit on a bill of exchange accepted by the defendant, which became due sometime in the year 1784, the defendant pleaded a set off, which consisted of bills of exchange and promissory notes of the plaintiff which the defendant had taken up or paid on his account. It was objected that though the plaintiff's demand against the defendant had accrued so far back as the year 1784, yet in fact he had kept it alive by having sued out process within the six years, and continued it; but as the defendant had not done so, his demand against the plaintiff must be held to be barred by the statute, and so not such a demand as could be set off. But Lord Kenyon said that as the transactions between the plaintiff and the defendant were

(*e*) Hicks v. Hicks, 3 East, 16.

all of the same date, and as the bills seemed to have been given for their mutual accommodation, it would be the highest injustice to allow one to have an operation by law and not the other; and his Lordship held the demand of the defendant to be good as well as that of the plaintiff, and suffered it to be set off.(*f*)

Where an administrator pleads a set off which is barred by the statute of limitations, it is no answer to the objection of the statute that the administrator is allowed nine months to collect the debts; as during the nine months he may sue, though he cannot be sued.(*g*)

8th. *Joint and separate demands.*

It is a general rule that, in an action by two persons, the defendant cannot set off a debt due to him from one of the plaintiffs, nor can one of several defendants set off a debt due to him alone from the plaintiff.(*h*)

But if there is an agreement that the set off be allowed, the rule is otherwise.(*i*) So demands against individual

(*f*) Ord v. Ruspini, 2 Esp. 569. See Catling v. Skoulding, 6 Term Rep. 189.

(*g*) Turnbull v. Strohecker, 4 McCord, 210.

(*h*) Chit. on Cont. 664. 6 Cowen, 261. 5 Maule & Sel. 439. Elder v. Lasswell, 2 Blackf. 349. Porter v. Nekervis, 4 Rand. 359. Warner v. Barker, 3 Wend. 400. Banks v. Pike, 3 Shepley, 268. Watson v. Hensel, 7 Watts, 344. 4 New Hamp. R. 236. 7 Conn. Rep. 221. 2 Bibb, 86.

(*i*) Kinnerley v. Hossack, 2 Taunt. 170. Lovel v. Whitridge, 1 McCord, 7.

members of a firm may be set off against demands of the firm, in an action brought by the latter, if the course of dealing of the firm in receiving such demands in payment is uniform, and so notorious that individuals dealing with them must be supposed to have had reference to it in their transactions with the firm.(*k*)

In general a debt owing by one of two or more partners cannot be set off against a partnership demand.(*l*) But a debt due from one who was the only apparent trader may be set off in an action brought by himself and partners, if the defendant was ignorant of the partnership at the time the debt was contracted.(*m*) So, in an action by a surviving partner for his separate debt, the defendant may set off a debt due on the partnership account; for he might sue the plaintiff for such debt.(*n*) And the rule is the same where the action is brought against a surviving partner.(*o*) So where the defendant gave a note to his bankers, on account of a debt due to them, and they endorsed the note to another firm consisting of some of the partners of the banking house, it was held that in an action by the firm on the note the defendant might set off a debt due to him from the bankers.(*p*)

(*k*) Evernghim v. Ensworth, 7 Wend. 326. And see 3 Meriv. 618.

(*l*) Howe v. Sheppard, 2 Sumner, 409. Ladue v. Hart, 4 Wend. 583. 7 Cranch, 565. 2 Bay, 146.

(*m*) Stracey v. Deey, 7 T. R. 361. 2 Esp. 469, n.

(*n*) Slipper v. Stidstone, 5 T. R. 493. 1 Esp. 47. 2 T. R. 476.

(*o*) French v. Andrade, 6 T. R. 582.

(*p*) Puller v. Roe, Peake, 197.

In the late case of *Sears* v. *Patrick*,(q) it was decided by the supreme court that a partnership debt cannot be set off against an individual debt due to one of the partners; although the notes and accounts of the firm have been transferred to such partner and he has undertaken to pay the debts of the copartnership. But this was a case where the suit was brought by the assignee of the individual partner, in his own name.

A debt on a joint and several bond may be set off in an action brought by only one of the obligors.(r)

A party holding a joint and several note against two makers is not bound to set off the same in an action against him by one of the makers.(s)

(q) 23 Wend. 528.
(r) Fletcher v. Dyche, 2 T. R. 32.
(s) Culver v. Barney, 14 Wend. 161.

CHAP. III.

IN WHAT ACTIONS A SET OFF IS ALLOWABLE.

It can be allowed only in actions founded upon demands which could themselves be the subject of set off according to law.(*a*)

It results from this that a set-off is admissible only in actions *ex contractu* ; such as assumpsit, debt, and covenant for the non-payment of money, and for which an action of indebitatus assumpsit might be maintained ;(*b*) or where a bond in a penalty is given for securing the payment of a certain sum of money, or of an annuity or growing sum.(*c*)

A set-off cannot be pleaded in actions *ex delicto*, such as tort, trespass, detinue, case, or replevin.(*d*) Thus a plaintiff in replevin cannot plead a set-off in bar to an avowry

(*a*) 2 R. S. 354, § 18, sub. 5. Gordon v. Bowne, 2 John. 150. 5 id. 105. Osborn v. Etheridge, 13 Wend. 339. Dowd v. Fawcett, 4 Dev. 92.

(*b*) Hutchinson v. Sturges, Willes, 261. Howlett v. Strickland, Cowp. 56. Bull. N. P. 179. Dowsland v. Thompson, 2 Black. 911.

(*c*) Collins v. Collins, 2 Burr. 820. Bab. on Set-Off, 8.

(*d*) Bull. N. P. 181. Mont. on Set-Off, 13. Keeler v. Adams, 3 Caines, 84. Sapford v. Fletcher, 4 T. R. 511. See Peterson v. Haight, 1 Miles, 250.

for rent.(e) This section of the statute was not intended to introduce a new principle in the law of set-off; but merely to declare the then existing law on the subject, as settled in our own and the English courts.(f)

Under the above provision of the revised statutes it has been decided by the supreme court, that where a tenant sued his landlord to recover costs of summary proceedings instituted by the latter, the landlord was not entitled to set off against such demand rent due to him from his tenant.(g) So a set-off is not allowable in an action of debt for the penalty in articles of agreement by which the defendants covenanted to maintain the plaintiff, &c. and provide him with proper medicine and attendance; the damages due upon such an agreement being uncertain and not capable of being set off.(h) So in an action for not accepting a bill of exchange, commenced before the expiration of the period the bill was to run, the defendant cannot set off a debt for goods sold; for the plaintiff's demand is for unliquidated damages.(i)

So where a declaration in assumpsit stated that in consideration that the plaintiff, for the accommodation and at the request of the defendant, would accept certain bills of exchange, and would deliver them so accepted to the defendant, in order that he might negotiate the same for his own

(e) Laycock v. Tuffnell, 2 Chit. 531. 1 Tidd's Pr. 716.
(f) Downer v. Eggleston, 15 Wend. 58.
(g) Osborn v. Etheridge, 13 Wend. 339.
(h) Hepburn v. Hoag, 6 Cowen, 613.
(i) Hutchinson v. Reid, 3 Camp. 329.

benefit; the defendant undertook to provide money for the payment of the bills as they became due, and to indemnify the plaintiff from any loss or damage by reason of the acceptance thereof; and assigned for breach that the defendant did not provide money for the bills, nor indemnify the plaintiff from damage; by reason whereof the plaintiff, as acceptor, was obliged to pay to the holders of the bills certain sums of money, with interest, charges and expenses; it was held on demurrer, that as the plaintiff might be entitled, on the declaration, to recover special damage, a set-off was not a good plea.(*k*)

In an action for the recovery of damages for the breach of a warranty in the sale of goods, the defendant is not entitled to a set-off of demands against the plaintiff.(*l*) Such damages are not for property real or personal sold, for money paid, or services done; nor are they liquidated or capable of being liquidated by calculation. Neither is the claim for which the suit is brought one which could be set off according to law.

It seems that the rule excluding set-off in actions of tort also extends to suits founded on breaches of trust. Thus, where A. & Co., merchants of Liverpool, remitted a bill to B. & Co. in London, with directions to get it discounted and apply the proceeds in a particular way, B. & Co. did not get the bill discounted, but received the money when it became due. Before that time A. & Co. had stopped

(*k*) Hardcastle v. Netherwood, 5 Barn. & Ald. 93.
(*l*) Wilmot v. Hurd, 11 Wend. 584.

payment and desired to have the bill returned to them. A commission of bankruptcy having been issued against them before the money was had on the bill by B. & Co. it was held that the latter were liable to be sued for the amount by the assignees of A. & Co., as money received for their use, and that B. & Co. could not set off a debt due to them from A. & Co.(*m*) But in a later case, which was said to be distinguishable from this, where A. remitted a bill of exchange to B. to be paid to a third person on A.'s account, and B. discounted the bill but did not pay over the proceeds, upon which A. sued him in assumpsit for money had and received, it was held that a set-off was admissible.(*n*)

In an action of covenant for not indemnifying a person against taxes, no plea of set off can be sustained.(*o*) So in an action for breach of covenant for quiet possession, a set-off cannot properly be pleaded.(*p*) And unliquidated damages arising from the breach of covenants to be performed by the plaintiff, cannot be set off in an action of covenant.(*q*) Therefore, to an action of covenant for rent by a landlord, the defendant cannot set off any uncertain damages that he may be entitled to recover against the landlord on any of the other covenants in the lease.(*r*)

(*m*) Buchanan v. Findlay, 9 Barn. & Cress. 738.

(*n*) Thorpe v. Thorpe, 3 Barn. & Adol. 580.

(*o*) Cooper v. Robinson, 2 Chit. 161. 5 Maule & Sel. 164.

(*p*) Warn v. Bickford, 7 Price, 550. Weigall v. Waters, 6 T. R. 488.

(*q*) Howlett v. Strickland, Cowp. 56.

(*r*) Weigal v. Waters, 6 T. R. 488. Tuttle v. Tompkins, 2 Wend. 407.

There can be no set off in an action brought upon a contract for the sale of goods on credit for a bill at a certain time, when the action is brought before the expiration of the time which the bill had to run.(*s*)

It should be observed, that the right of set off does not depend upon the form of the action which the plaintiff thinks proper to bring, provided it is in form *ex contractu*, but upon the nature of the demand for which the suit is brought. The plaintiff cannot, therefore, by declaring specially, when he might recover the debt under a general count, deprive the defendant of his right of set off.(*t*) Thus, in the case of *Burgess* v. *Tucker*,(*u*) where the plaintiff, instead of bringing an action of debt upon an award in his favor, brought an action upon his arbitration bond, and assigned, as one of the breaches, the non-performance of the award, the defendant was allowed to give in evidence an offset against the award; leaving the penalty of the bond entire, to cover any further breaches of the condition thereof. So, in the case of *Birch* v. *Depeyster*,(*v*) where the plaintiff had a special count in his declaration against the defendant for not accounting as the master of a ship, together with the common counts, Gibbs, Ch. J. decided, that as the plaintiff might have recovered his demand under the common counts for money had and received to his use, he could not deprive the defendant of his set off by

(*s*) Hutchinson v. Reid, 3 Camp. 329.
(*t*) Per Chan. Walworth, Downer v. Eggleston, 15 Wend. 58.
(*u*) 5 John. 105.
(*v*) 4 Camp. 385.

declaring specially, and assigning a breach for not accounting.

A suit in chancery to foreclose a mortgage, or to obtain a satisfaction of the amount due from the defendant, is a suit in which the latter may offset a debt due to him from the complainant, which would be a proper subject of offset in a suit brought by the complainant at law to recover the amount due upon his mortgage.(*w*) But a court of equity will not permit a defendant to offset against the complainant, in a suit in that court, a demand against him as a mere surety for the debt of a third person, for which the defendant has security upon a fund belonging to the principal debtor, sufficient to satisfy the debt.(*x*)

The right of set off may be lost, by the defendant bringing a suit for the amount of his claim against the plaintiff, or for a part thereof. Thus, if a party bring an action for a part only of an entire and indivisible demand, the verdict and judgment in that action are a conclusive bar to a subsequent suit for another part of the same demand. Neither can he avail himself of such part by way of set off, in a subsequent action against him by the opposite party.(*y*)

Where damages due upon an agreement are not, in their nature capable of being set off, they cannot be met by a set off in an action for them.(*z*)

(*w*) Chapman v. Robertson, 6 Paige, 627. Holden v. Gilbert, 7 id. 208. Rosevelt v. Bank of Niagara, Hopk. 499.

(*x*) Holden v. Gilbert, 7 Paige, 208.

(*y*) Miller v. Covert, 1 Wend. 487.

(*z*) Hepburn v. Hoag, 6 Cowen, 613.

CHAP. IV.

BY AND AGAINST WHAT PARTIES A SET OFF MAY BE HAD.

1. Assignor and assignee.
2. Bankrupts and insolvents.
3. Executors and administrators.
4. Factors and brokers.
5. Husband and wife.
6. Partners.
7. Principal and agent.
8. Trustees and *cestuis que trust.*

1st. *Set off by and against assignor and assignee.*

We have already seen in what cases the statute has authorized a set off in favor of an assignee of a demand ;(*a*) and in what cases a set off may be had against the assignor of a judgment, contract, or of a negotiable promissory note or bill of exchange.(*b*) There are some additional points respecting assignors and assignees, which it may be well to notice in this place.

(*a*) See ante, p. 63.
(*b*) Ante, p. 37, 54, 57.

The assignee of a policy of insurance takes it subject to every set off that existed as between the original parties before the assignment.(*c*) But if the underwriter have notice of such assignment, and either makes no objection or is silent as to any claim of set off, he will be estopped from such claim, in an action on the policy, brought by the assignee.(*d*)

Where a promissory note is fraudulently assigned, for the purpose of enabling the assignee to set it off against the assignees of a failing debtor, it seems that the assignee will not be entitled to the set off.(*e*)

A. having obtained two verdicts against B., assigned his interest in them to his counsel in consideration of one dollar, and of professional services previously rendered by them. B. had previously obtained a judgment against A., which, with the rest of his property, he had assigned to trustees for the benefit of his creditors. After the assignment of A.'s verdicts, but before judgments had been entered upon them, B. received from his trustees a re-assignment of the judgment against A. without consideration, and for the purpose of enabling him to set it off against A.'s verdicts. It was held that B. might set off this judgment.(*f*)

(*c*) Gourdon v. Ins. Co. N. America, 3 Yeates, 329. Rousset v. The same, 1 Binn. 429.

(*d*) Ibid.

(*e*) Richter v. Selin, 8 Serg. & Rawle, 425. And see Hendricks v. Judah, 1 John. 319.

(*f*) Jacoby v. Guier, 6 Serg. & Rawle, 448.

An equitable set off, which an obligor had against an obligee at the time of the assignment, is available against the assignee.(*g*)

Where a note is assigned to enable the assignee to collect and pay over the proceeds in discharge of debts for which he is security for the assignor, no demand against the assignee, acquired subsequently to the assignment, can be set off in equity against a judgment on the note, even on the ground of the insolvency of the assignee. For the assignee is *quasi* trustee for the assignor.(*h*)

A commission of bankruptcy is legal notice to affect the subsequent assignee of a promissory note with the statute right of set off.(*i*)

A. made an assignment to the plaintiffs, in trust, first, to pay the costs and charges of executing the trust, and then to pay such creditors as should release within sixty days. None of the creditors released within the time prescribed. It was held that the defendant could not set off a note of the assignor, against an action by the assignees to recover the price of goods which had belonged to the assignor but were sold by themselves to the defendants.(*k*)

(*g*) Markham v. Todd, 2 J. J. Marsh. 365. Stocking v. Toulmain, 3 Stew. & Porter, 35.

(*h*) Jackson v. Speed, 3 id. 58.

(*i*) Humphries v. Blight's Assignees, 4 Dall. 370.

(*k*) Wilworth v. Mountford, 8 Serg. & Rawle, 124.

In an action by the assignee of a bond against the obligor, it was held in Pennsylvania that the latter might give in evidence by way of set off, articles of agreement between himself and the obligee, for the sale of real estate, by which the parties bound themselves in a certain sum, to be paid by the party failing to perform his contract: whether such sum was to be considered as a penalty, or in the nature of stipulated damages.(*l*)

A. and B. executed a bond to C., who assigned it to D., C. and E. drew a note in favor of F., who assigned it to A., after the death of E., but before the assignment to D. In an action by D. against A. and B., it was held that the note might be set off against the bond.(*m*)

The right of set off against a note or bond, however, does not exist for demands subsisting against intermediate assignees, through whose hands such note or bond may have passed, by blank indorsement or otherwise.(*n*)

In certain cases the assignee of a chose in action may prosecute for the same in his own name, instead of using the name of the assignor; in which case the defendant has the same right to set off his demands as if the suit were brought in the name of the assignor. Thus, it is provided by the revised statutes, that "the assignee or assignees, for a valuable

(*l*) Mann v. Dunyon, 11 Serg. & Rawle, 75.
(*m*) Robinson v. Beale, 3 Yeates, 267.
(*n*) Stocking v. Toulmain, 3 Stew. & Porter, 35.

consideration, of any bond, note, or other choses in action which have been or may hereafter be assigned, if the assignor be dead, and there be no executors or administrators appointed upon his or their estate, or if such executors or administrators have no interest in the things so assigned, or shall refuse to prosecute for the same, may sue and recover, in his, her, or their own name or names, upon such bonds, notes, and choses in action; and the defendant, in all such suits, until due notice of such assignment shall have been given, may set up and avail himself of any defence he may have in any such action, in the same manner and with the like effect as if the assignor had been living and the action had been prosecuted in his name."(*o*)

2d. *Set off by and against bankrupts and insolvents.*

It is provided by statute that where an action is brought by the assignee of an insolvent, imprisoned, absent, concealed, or absconding debtor, no set off shall be allowed of any debt, unless in the cases provided in the fifth chapter of the second part of the revised statutes.(*p*) The cases mentioned in the fifth chapter of the second part are the following: where the debt was owing to the creditor by the debtor before the first publication of the notice required in the first article, (2 R. S. 1;) or before the appointment of trustees under the second article, (2 R. S. 14;) or before presenting the petition of the insolvent under the third, fifth and sixth articles, (2 R. S. 15, 28, 31;) or be-

(*o*) 2 R. S. 2d ed. 274, § 5.
(*p*) 2 R. S. 355, § 11.

fore the publication of notice to creditors under the fourth article, (2 R. S. 24.)(*q*)

The statute also authorizes the trustees or assignees appointed under the first title of the fifth chapter of the second part, where mutual credit has been given by any debtor (except a debtor proceeding under the sixth article of that title, i. e. a debtor imprisoned in execution in civil causes) and any other person; or mutual debts have subsisted between such debtor and any other person; to set off such credits or debts and pay the proportion or receive the balance due. But no set off shall be allowed of any claim or debt which would not be entitled to a dividend as provided in another section. (2 R. S. 46, § 33.) And no set off is to be allowed by such trustees of any claim or debt which has been purchased by, or transferred to, the person claiming its allowance, which could not be set off by him according to the above provisions of the statute, in a suit brought by such trustees.(*r*)

These sections of the statute were intended by the revisers, as they state in their Notes, to be made conformable to the decision of the supreme court in the case of *Johnson* v. *Bloodgood*.(*s*) In that case it was held that where a note is purchased after it is due, every presumption is to be made against the purchaser. Therefore if he

(*q*) 2 R. S. 41, § 7.
(*r*) Id. 47, §§ 36, 37.
(*s*) 1 John. Cas. 51. 2 Caines' Cas. in Er. 303.

state it generally, to have been purchased in such a year, and the maker has assigned his property under the insolvent law on the 16th of January, in that year, it shall be presumed the purchase was after the assignment. And a note purchased after due and after an assignment under the insolvent law, cannot, in an action by the assignees, in the name of the insolvent, be set off against a debt due to the insolvent's estate. For the note being overdue, was held sufficient to put the defendant on inquiry relative to the maker's circumstances, and was therefore equivalent to actual notice.(*t*) The same point has also been decided in South Carolina.(*u*) And the same doctrine prevails in cases of bankruptcy. The set off must have been an existing debt between the parties, at the time the bankruptcy occurred.(*v*) Therefore a note endorsed to the defendant after the act of bankruptcy, though issued by the bankrupt before, cannot be set off. But if the defendant can prove that such note was endorsed to him before the bankruptcy, or was made payable to him in the first instance, and dated before the bankruptcy, it may be set off.(*w*)

It will be observed the statute confines the power of assignees or trustees of insolvents, &c. to offset, without suit being brought, to cases of *mutual credits*, or *mutual debts*. This provision is similar to that contained in the

(*t*) See also Anderson v. Van Alen, 12 John. 343.
(*u*) Assignees of Lowie v. Williamson, 3 McCord, 247.
(*v*) Id. Ib.
(*w*) Ex parte Hall, Co. Bank. Laws, 553.

English statutes of set off.(*x*) And it has been decided that to constitute a mutual credit within the 28th section of 5 Geo. II, ch. 30, it must be confined to pecuniary demands or such credits as in their nature will terminate in a debt.(*y*)

Therefore a guaranty, being merely a contract to indemnify against contingent damages, cannot form the subject of a mutual credit.(*z*) But a mutual credit may be constituted, though the parties do not mean particularly to trust each other.(*a*) So where persons indebted to the bankrupt had accepted a bill drawn by him, it was held that they were entitled to set it off.(*b*) So it was held, where a defendant had lent his acceptance to the bankrupts, on a bill which did not become due till after the bankruptcy, and was then outstanding in the hands of third persons, and the defendant had paid the amount after the commission issued, and before an action was brought against him by the assignees, that he was entitled to set off the bill under the words "mutual credit."(*c*)

The principle which the bankrupt laws seem to have in view, from the earliest time to the last provisions made therein, is this—that where two persons have dealt with

(*x*) 6 Geo. 4, ch. 16, § 50. 5 Geo. 2d, ch. 30.
(*y*) Rose v. Hart, 2 Moore, 547. 8 Taunt. 499.
(*z*) Sampson v. Burton, 4 Moore, 515. 2 Brod. & Bing, 89, S. C.
(*a*) Hankey v. Smith, 3 T. R. 507, n.
(*b*) Ex parte Wagstaff, 13 Ves. 65.
(*c*) Smith v. Hodson, 4 T. R. 211.

each other on mutual credit, and one of them becomes bankrupt, the amount shall be settled between them, and the balance only payable on either side.(*d*)

An important distinction is to be noticed between the provisions of the statute respecting set off generally, and those which relate to set off by and between insolvents and their creditors. In the former case, we have seen that, in general, unliquidated claims cannot be set off;(*e*) whereas, in the latter, the term *mutual credit* is used. And *mutual credit*, according to Lord Ellenborough, in *Cummings* v. *Forrester*,(*f*) *ex vi termini*, imports unliquidated damages; and when they can be so arranged, the account may be taken between the parties.(*g*)

The word *credit* is more comprehensive than the word *debt*, and the disposition of the court is, that all opposite demands should be set off.(*h*) Where there is a trust between two men on each side, that makes mutual credit.(*i*) Or, as was said by Dallas, J. in *Key* v. *Flint*,(*k*) mutual credit must be inferred from a reciprocity of trust.

The first case in which the distinction between *mutual debt* and *mutual credit* was taken was *Ex parte Prescott*,

(*d*) Per Tindal, C. J. in Gibson v. Bell, 1 Bing. N. C. 746.
(*e*) Ante, p. 76.
(*f*) 1 Maule & Selw. 499.
(*g*) Id. ib.
(*h*) Ex parte Deeze, 1 Atk. 228. Atkinson v. Elliott, 7 T. R. 378.
(*i*) Per Buller, J., French v. Fenn, Cooke, 565.
(*k*) 8 Taunt. 22.

in the matter of Prescott,(*l*) where the petitioner, a creditor of the bankrupt for 110*l*., and a debtor to him upon a bond for 340*l*., payable with interest on a day not then arrived, applied to the court of chancery that he might set off his demand of 110*l*. against the principal and interest due on the bond, as far as it would go, and not be obliged to prove his debt under the commission, and take a dividend upon it only. Lord Hardwicke held, that though this was not in strictness a mutual debt, yet it was a mutual credit; for the bankrupt gave a credit to the petitioner in consideration of the bond, though payable at a future day; and the petitioner gave credit for the debt the bankrupt owed him upon simple contract, and that it was therefore within the equity of the 5 Geo. II.; and an account was directed to be taken between the petitioner and the bankrupt, and the balance only to be paid to the assignees.

Mutual credit does not extend to a deposit of property, without any authority to turn it into money. Therefore, if cloths be left with a fuller to be dressed by a proprietor, who at the time of the delivery is indebted for a previous balance, and the proprietor becomes bankrupt, the fuller cannot set off the debt due for the previous balance against a demand by the assignees for the cloths.(*m*) Neither does mutual credit apply to a case where only part of the firm are bankrupts.(*n*) Thus, where two out of three

(*l*) 1 Atk. 230.
(*m*) Rose v. Hart, 2 Moore, 547.
(*n*) Stainforth v. Fellows, 1 Marsh. 190.

partners, after having committed an act of banrukptcy, gave a bill in the name of the firm to the defendant, to whom the firm were at that time indebted in a larger amount than the bill; it was held, in an action by the assignees of the two bankrupts, and the solvent partner, for the amount of the bills, that the defendants could not set off the debt due to them from the firm.(*o*)

Mutual credit, although not confined to pecuniary transactions, is confined to such credits as must, in their nature, terminate in debts;(*p*) as a sum payable at a future day, or a delivery of property with directions to turn it into money.(*q*) Thus, if a demand be payable at all events, though at a future day, it may be proved under a commission against the debtor, or set off in an action brought by his assignees; but if it rest in contingency whether it will be paid or not, it cannot be so proved or set off, unless it be secured by a penalty which is forfeited at law.(*r*)

A. having given defendant his acceptance for 20*l*, defendant, in consideration thereof, undertook to endorse to him a bill drawn on B. He gave the bill, but did not endorse it. A. having become bankrupt, and his acceptance having been dishonored, the defendant proved the amount under the commission, and B. having refused to pay his bill unless endorsed by the defendant, the assignees of A.

(*o*) Thomason v. Frere, 10 East, 418.
(*p*) Per Bayley, J., Easum v. Cato, 5 Barn. & Ald. 866.
(*q*) Per Gibbs, C. J., 2 Moore, 547.
(*r*) Hancock v. Entwhistle, 3 T. R. 435.

brought an action on the contract of the defendant to endorse the bill, to which he pleaded a set off; it was held that the set off should not be allowed, for this was not a case of mutual credit; it was merely a cause of action arising from the non-performance of a contract. And Parke, J., observed: "The position with respect to mutual credits is confined to debts between the bankrupt and other parties, or to transactions necessarily ending in debts." Taunton, J.: "The damages were unliquidated, and their amount dependent on circumstances. How could the commissioners in such a case have stated an account between the parties as directed by the acts?"(s)

In an action by assignees for not accepting a bill of exchange pursuant to an agreement with the bankrupt on balancing accounts, without alleging special damages, it was held that the defendant might set off money lent to the bankrupt; as the transactions constituted "mutual credits;" for, as the agreement was to accept a bill of exchange for a balance then due from the defendant to the bankrupt, and as there was no special damage alleged in the declaration, the measure of damages would necessarily be confined to the amount of the bill if drawn, and the interest on it; so that the demand, though unliquidated at the moment, was capable of being reduced to a certainty by calculation, and the commissioners or assignees might easily have stated an account between the parties. The case was distinguishable from *Rose* v. *Sims*, above referred to;

(s) Rose v. Sims, 1 Barn. & Adol. 521.

for there if the endorsement had been made, it would not, in its nature, necessarily have terminated in a debt from the defendants; for the acceptor would have been the debtor, the endorser a guarantee only.(*t*)

A party cannot avail himself of his own wrongful act to establish a mutual credit. Where a trader deposited a bill with a creditor to whom he was indebted on a general account, for the express purpose of having money advanced on it without reference to the general account; and the creditor made an advance on the bill, but not to the entire amount, and the trader afterwards became a bankrupt; it was held that the creditor could not set off the debt on the general account, against an action by the assignees for the bill, who tendered the amount advanced on it; for it was not a case of mutual trust, (as the bill was entrusted to the creditor for the specific purpose of having money advanced;) but, on the contrary, it was a gross breach of trust.(*u*)

If a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract and recover the value of the goods, in trover; but if they bring *assumpsit* they affirm the contract, and then the creditor may set off his debt.(*v*) But it is not a sufficient affirmance of a debt, so as to permit

(*t*) Gibson v. Bell, 1 Bing. N. C. 743.

(*u*) Key v. Flint, 8 Taunt. 21. See also Buchanan v. Findlay, 9 Barn. & Cress. 738.

(*v*) Smith v. Hodson, 4 T. R. 211.

the party to set it off in an action by the assignees of a bankrupt, that they permitted the defendant to prove the debt proposed to be set off.(*w*)

To an action brought by the assignees of a bankrupt for a debt due to the bankrupt's estate, the defendant, as a general rule, cannot set off cash notes issued by the bankrupt, payable to bearer, bearing date before his bankruptcy, unless he show further that such notes came to his hands before the bankruptcy.(*x*) But proof that notes of the bankrupt to the amount of the set-off were in the defendant's possession three weeks before the bankruptcy, has been held sufficient to justify the jury in inferring that the notes in question were in his possession at the time of the bankruptcy.(*y*) It is also settled that in an action brought by the assignees of certain bankers, a party has a right to set off notes of such bankers taken by him after he knew that they had stopped payment, but before he knew that they had committed an act of bankruptcy.(*z*)

Where a bill or note of the bankrupt is taken up after the bankruptcy, the holder will still be entitled to set it off, provided he held it at any time before the bankruptcy occurred.(*a*)

(*w*) Pirie v. Mcanett, 3 Camp. 279.

(*x*) Dickson v. Evans, 6 T. R. 57. Lucas v. Marsh, Barnes, 453. The rule is the same as respects *checks* issued by the bankrupt payable to bearer. Ogden et al. v. Cowley, 2 John. 274.

(*y*) Moore v. Wright, 6 Taunt. 517. 2 C. Marsh 209.

(*z*) Hawkins v. Whitten, 10 Barn. & Cress. 217. Dixon v. Cass, 1 Barn. & Adol. 343.

(*a*) Id. ib.

To enable the holder of a bankrupt's acceptances to avail himself of them in an action by the assignees against himself on his own acceptance, by way either of set-off or of mutual credit, he must most distinctly prove either that the obligation on himself to pay the bill so set off existed before the bankruptcy, or that there was a mutual credit created in the origin of the bill.(*b*) The debt must be proved to have been due before the act of bankruptcy on which the commission is founded, though it is immaterial whether it was then payable or not. Thus if the holder of an acceptance buy goods of the acceptor, and the acceptor becomes bankrupt, the purchaser may set off the acceptance against the price of the goods.(*c*)

If a trader being employed as an agent has money entrusted to him for the purpose of the agency, and he, instead of so employing it, applies it to his own use, it is a fraud, and does not constitute a credit.(*d*)

A creditor of a partnership, having made farther advances on the security of a bill deposited with him for that purpose by the partners, and having undertaken to receive the amount when due, and return the surplus—the bill having been dishonored and remaining in his hands unpaid—is not entitled, on the bankruptcy of the partners, to set off his prior advances against a demand by the assignees for the bill.(*e*)

(*b*) Collins v. Jones, 10 Barn. & Cress. 777.
(*c*) Ouchterlony v. Easterby, 4 Taunt. 888.
(*d*) Whitaker v. Hall, 1 Glyn & J. 313.
(*e*) Ex parte Flint, 1 Swans. 30.

Where a bill or note of the bankrupt is taken up after the bankruptcy, the defendant will still be entitled to set it off, provided he held it at any time before the bankruptcy occurred. Thus in an action of assumpsit by the assignees of R. a bankrupt, on a promissory note drawn by defendant, payable to G. or order, and by him indorsed to the bankrupt before the bankruptcy, it appeared that in October, 1825, G. applied to the bankrupt to discount the note, and took, as part of the proceeds, a bill of exchange, accepted by the bankrupt, payable to G.'s order, G. indorsed this bill for value to the defendant, and he got it discounted by H. who was the holder when it became due. A commission of bankrupt issued against R. on the 23d of December, and the bill became due on the 24th, when it was presented and dishonored. On the 26th, H. received the amount from the defendant and returned the bill to him: Held that he had a right to set off the bill against the demand of the assignees on the promissory note.(*f*)

To enable the holder of a bankrupt's acceptances to avail himself of them, in an action by the assignees against himself on his own acceptance, he must clearly prove, either that the obligation to pay the bankrupt's acceptances subsisted before the bankruptcy, to bring the case within the ordinary law of set-off, or that there was some connection in the origin of the transaction, to bring it within the cases of mutual credit.(*g*)

(*f*) Collins v. Jones, 10 Barn. & Cress. 777.
(*g*) Ouchterlony v. Easterby, 4 Taunt. 888. 2 Rose, 272.

Where a loss attaches upon a policy of insurance after the bankruptcy of the insured, it constitutes a cause of action in the assignees, not an interest in the bankrupt admitting a set-off.(*h*) So a broker who is indebted to assignees for premiums due to them upon policies subscribed by the bankrupt, is not entitled to set off returns of premium due upon the arrival of ships subsequent to the bankruptcy.(*i*)

Where, after the bankruptcy of A. and before he had obtained his certificate, B., one of his creditors, purchased goods from him, for which A. brought an action against him after obtaining his certificate; B. to this action was not allowed to set off his old debt, that being barred by A.'s certificate.(*k*)

Costs ordered to be paid, but which are not taxed until after the bankruptcy of the person who is to receive them, cannot be set off by the party from whom they are due, against a debt owing by him to the bankrupt; as they do not become a debt until they are taxed.(*l*)

Upon the dissolution of a copartnership the defendant agreed to pay his copartners 6817*l*. as his share of the liabilities of the firm; they taking the effects and assets, and

(*h*) Ex parte Herbert, 2 Rose, 249. Ex parte Blagden, 19 Ves. 465.

(*i*) Goldsmidt v. Lyon, 4 Taunt. 541. Glennie v. Edmunds, id. 775.

(*k*) Hayleer v. Sherwood, 2 Nev. & Man. 401.

(*l*) Ex parte Rhodes, 15 Ves. 539.

undertaking to pay a debt of 51,891*l.* due from the firm to H. After the dissolution they became bankrupts, and never paid H.: Held that in an action by their assignees for the 6817*l.* the defendant could not set off their undertaking to pay the 51,891*l.* to H.(*m*)

To an action by assignees of a bankrupt for the price of a phæton, for which defendant had agreed to pay ready money, defendant pleaded a set off in respect of a bill of exchange drawn by H., accepted by the bankrupt, and endorsed by H. to defendant. Plaintiffs replied that after the bill was dishonored, H. endorsed it to defendant without consideration, in trust that defendant should purchase the phæton of the bankrupt, hand it over to H. and fraudulently attempt to set off the bill against the price of the phæton: Held a sufficient answer to the claim of set off.(*n*)

To an action by assignees of a bankrupt, for not accepting a bill of exchange according to the contract made between the bankrupt and the defendant, the defendant pleaded a plea of mutual credit and set off with the bankrupt; to which plea the plaintiff demurred. Held that the plea was an answer to the action, and that if the defendant made the contract fraudulently, the fraud should have been replied.(*o*)

(*m*) Abbott v. Hicks, 5 Bing. N. C. 578.
(*n*) Lackington v. Combes, 6 Bing. N. C. 71.
(*o*) Goom v. West, 2 Lond. Jurist, 940.

If in an action against the assignees of a bankrupt, or in support of a set off in answer to an action brought by them, an account be tendered in evidence, signed by the bankrupt, it is not requisite in the first instance, in order to render that document admissible, to show that it was really made up and signed by the bankrupt previous to the act of bankruptcy.(*p*)

Where a person puts his name to a bill of exchange for the accommodation of another, who afterwards becomes bankrupt, that is a credit likely in its nature to end in a debt, and may form the subject of a "mutual credit" within the 6 Geo. IV, ch. 16, § 50.(*q*)

Where an insolvent debtor had, after his insolvency, deposited goods with a factor for sale, and the goods were purchased by one who had been a creditor of the insolvent prior to the insolvency, it was held, in an action brought by the factor to recover the price of the goods, that the defendant could not set off the debt.(*r*)

3d. *Set off by and against executors and administrators.*

By the revised statutes, it is enacted that "in suits brought *by* executors and administrators, demands existing against their testators or intestates, and belonging to the

(*p*) Sinclair v. Raggalay, 3 T. R. 683; 4 Mee. & Wels. 312.
(*q*) Hulme v. Muggleston, 6 Dowl. P. C. 112.
(*r*) Boinod v. Pelosi, 2 Dallas, 43.

defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased."(*s*)

And " whenever a set off is established in a suit brought by executors or administrators, the judgment shall be against them in their representative character, and shall be evidence of a debt established, to be paid in the course of administration ; but execution shall not issue thereon, until directed by the surrogate who granted letters testamentary or of administration."(*t*)

In actions *against* executors and administrators, the defendants may set off demands belonging to their testators or intestates, in the same manner as such testators or intestates would have been entitled to set off the same in an action against them.(*u*)

Previous to the revised statutes it had been decided by the supreme court, in the case of *Root* v. *Taylor*,(*v*) that in an action brought by an administrator, for a debt due to his intestate, the defendant could not set off a debt due from the intestate purchased by the defendant after the death of the intestate.(*w*) The 23d section of the statute above refer-

(*s*) 2 R. S. 355, § 23. See Perrine v. Warren, 3 Stew. R. 151.
(*t*) Id. § 24.
(*u*) Id. § 25.
(*v*) 20 John. 137.
(*w*) See also Happoldt's Adm'r v. Jones, Harper, 109. Crews v. Williams, 2 Bibb, 262. Schmidt's Adm'r. v. Crafts, 1 Rice's Dig.

red to was introduced in order to carry out the principle of this decision.

And since the above sections of the statute were adopted, it has been held that in a suit by an administrator for a debt created since the death of the intestate, the defendant cannot set off a debt due to him from the intestate.(x) And this is the English doctrine also, under a statute of set off substantially similar to ours. And it makes no difference whether the executor or administrator describes himself as such or not.(y) The reason of the rule is, that if the set off were allowed, in such a case it would alter the course of distribution. The demand when collected is assets, out of which the defendant is entitled to be paid only in due course of administration; whereas, if the set off be allowed, there might be an undue preference over other creditors. His debt would thus be paid in any event.(z)

In an action by the executors of an underwriter, against a broker, for premiums due on policies subscribed by the testator, the defendant cannot set off returns of premiums

230. But it has been decided in Massachusetts that in such an action the defendant may set off a demand for money paid by him to defray the funeral expenses of the testator or intestate. See Adams v. Butts, 16 Pick. 343.

(x) Fry v. Evans, 8 Wend. 530. And see Shaw v. Gooking, 7 N. Hamp. Rep. 16, S. P.

(y) Shipman v. Thompson, Willes, 103. Kilvington v. Stevenson, id. 264, n. Teggetmeyer et al. v. Lumley, id. 264. Bab. on Set Off, 63, 64. Tidd's Pr. 9th Lond. ed. 666.

(z) Per Nelson, Ch. J. 21 Wend. 674. 8 id. 531.

which became due after the testator's death.(*a*) And in an action by an administrator to recover a debt due to his intestate, the defendant cannot set off a debt due to him by the administrator for services rendered to him in the course of his administration of the estate.(*b*)

So if the cause of action arise partly in the time of the testator, and partly in the time of the executor, yet the defendant cannot set off a debt due to him from the testator.(*c*)

But it has been decided in Alabama that in an action by an administrator, on a note executed to him as such, the defendant may set off an order drawn in favor of the defendant, by a stranger, on the administrator, and accepted by him in that capacity.(1)

A defendant who is sued as executor or administrator cannot set off a debt due to himself personally; nor can a defendant who is sued for his own debt, set off what is due to him as executor or administrator.(*d*)

And where the cause of action arises in the lifetime of

(*a*) Houston v. Robertson, 6 Taunt. 448. 2 Marsh. 138. Holt's N. P. C. 88.

(*b*) Stewart v. Commonwealth, 8 Watts, 76.

(*c*) Teggetmeyer v. Lumley, Willes, 264, n. Waefersberger v. Bucher, 10 Serg. & Rawle, 10 Waln v. Anthony, 5 id. 468.

(1) Tate v. Chandler, 4 Stew. & Porter, 417.

(*d*) Bab. on Set Off, 65. Mead v. Merritt, 2 Paige, 402. Selw. N. P. 4th ed. 145. Potter v. Burd, 4 Watts, 15. Tidd's Pr. 9th Lond. ed. 666. Cas. Pr. C. P. 151.

the testator, the defendant cannot set off a promissory note given to him by the testator, but which is not due at the time the action is brought. Thus, where A.'s bankers, for nine or ten years previous to his death, had been in the habit of accommodating him with a loan of 1000*l.* upon the security of his promissory note, which was renewed every three months, the bankers, upon those occasions, discounting the note, by placing the amount of it to the credit of A., as cash paid in by him and debiting him on the other side with the discount. A. died fifty three days before the last promissory note given by him to his bankers became due; but the bankers, as soon as they were informed of A.'s death, entered that note to the debit of A.'s account, allowing on the other side a rebate of discount for the time it had to run. The executors of A. having, before the fifty three days expired, sued the bankers for the balance in their hands at the time of A.'s death, it was held that the bankers could not set off the promissory note.(*e*)

In an action against an administrator, an order drawn by the plaintiff in favor of a third person, on the intestate, found among the intestate's papers and not rebutted by other evidence, may be set off, and will entitle the defendant to a deduction *pro tanto*.(*f*)

In an action by an administrator, on a promissory note

(*e*) Rogerson v. Ladbroke et al., 1 Bing. 93. 7 Moore, 412, S. C.

(*f*) Nebbe v. Price, 2 Nott & McCord, 328.

given to the intestate, the defendant offered as a set off that he had signed a note as surety for intestate in his life-time, and paid it since his death; it was held a mutual credit, which might be set off under the discount act of South Carolina.(*g*)

An administrator who has purchased a judgment against a plaintiff since the rendition of a judgment against him for a debt owing by the intestate, will not be allowed by the court, in the exercise of its equitable powers, to set off such judgment against the judgment in favor of the plaintiff, on motion.(*h*) Neither can an executor set off a demand purchased by him after the death of the testator against a debt due by the estate to the person against whom he held the demand so purchased.(*i*)

Whenever a set off is established in a suit brought by executors or administrators, the judgment must be against them in their representative character, and will be evidence of a debt established, to be paid in the course of administration; but execution cannot issue thereon until directed by the surrogate who granted letters testamentary or of administration.(*k*) This section of the revised statutes remedies a defect in the previous law. By the construction

(*g*) Hinds v. Adm'r of David, Harp. Rep. 423. The contrary has been decided, however, in Ohio. See Granger's Adm'r v. Granger, 6 Ham. 42.

(*h*) Hills v. Tallman's Adm'r, 21 Wend. 674.

(*i*) Mead v. Merritt, 2 Paige, 402.

(*k*) 2 R. S. 355, § 24.

given to the old law,(*l*) judgment and execution for a balance due to defendant on a set off, in a suit brought by executors, was against the executors personally. This, as the revisers remark, in recommending this alteration in the law, was calculated to deter the bringing of suits which the executor might be bound to institute.(*m*)

4th. *Set off by and against factors and brokers.*

If a person purchase goods of a factor, knowing him to have made the sale in that capacity, in an action by the factor for the price of the goods the defendant cannot set off a demand which he may have against the plaintiff.(*n*) But if a factor (who sells under a *del credere* commission) sell goods as his own, and the buyer knows nothing of the principal, the buyer may set off any demand he may have on the factor, against the demand for the goods made by the principal.(*o*) Yet a purchaser cannot set off a debt due from the seller of goods by the medium of a factor, if the factor have a lien upon the goods, even though such principal be named at the sale.(*p*) And if, before they are delivered, and before any part of them is paid for, the purchaser is informed that they belonged to a third person, in an action by the latter the purchaser cannot set off what

(*l*) See 10 John. 366.

(*m*) See Rev. Notes to 2. R. S. 355, § 24.

(*n*) Bowne v. Robinson, 2 Caines Cas. Er. 341.

(*o*) George v. Claggett, 7 T. R. 359; S. C. 2 Esp. 557; S. P. Rabone v. Williams, 7 T. R. 360, n.

(*p*) Atkyns v. Amber, 2 Esp. 493.

is due to him by the factor, as this is not a case of mutual credit.(q)

But the character of *broker* is materially different from that of *factor*. A factor is a person to whom goods are consigned for sale, by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation. He is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name; and if the broker sells without disclosing the name of his principal, he acts beyond the scope of his authority, and the buyer cannot set off a debt due from the broker to him against the demand for the goods made by the principal.(r)

A broker who pays to A. the price of goods sold by him for A. under a *del credere* commission is entitled to set off the amount against the assignees of B. for whom he bought the goods; but where the jury found a verdict disallowing such set off, and it was doubtful, on the evidence whether

(q) 1 Har. & Edw. N. P. 356. Per Lord Mansfield, in Rabone v. Williams, 7 T. R. 360.

(r) Baring v. Corrie, 2 Barn. & Ald. 137. Bab. on Set Off, 50.

the payment was made before disclosure of the name of A. to B., the court granted a new trial.(*s*)

An agreement by a broker that he will sell goods for his principals, and pay over the proceeds, without setting off a debt then due from the principals to him, is not binding on the broker so as to deprive him of his legal right of lien or set off. But if he also agree not to set off a debt due from a prior firm, which by a previous letter the principals had agreed to pay him, the principals having assumed the funds of that firm; the letter and the agreement must be set against each other, and the broker will not be allowed to set off that debt against the proceeds of the goods.(*t*)

A broker cannot set off the amount of losses and returns of insurance which he is authorized to receive from the underwriter, in an action by the latter for his premium.(*u*)

Upon an action against the underwriter for a loss, the underwriter cannot set off the premiums, although they have never been paid, unless he can make it appear that the state of the relative accounts between assured, broker, and underwriter, is such as to take the case out of the ordinary rule, which is that the receipt for the premiums is conclusive evidence for the assured that he has paid the premium to the underwriter.(*v*)

(*s*) Morris v. Cleasby, 1 Maule & Sel. 576.

(*t*) McGillivray v. Simpson, 9 Dow. & Ry. 35. 2 Car. & P. 320.

(*u*) Wilson v. Creighton, 1 Marsh. Ins. 297. De Gaminde v. Pigou, 4 Taunt. 246.

(*v*) Foy v. Bell, 3 Taunt. 493.

Where a defendant purchased as broker for B. the goods of A., for whom he sold them under a *del credere* commission and did not disclose, at the time, the name of A., but disclosed it soon after, and afterwards paid A. the price; Held that in an action by the assignees of B. to recover the balance due upon a resale of the goods made by defendant on account of B., defendant was not entitled to set off the payment made to A.(*w*)

In an action by the executors of an underwriter against a broker, for premiums due on policies subscribed by the testator, the broker cannot set off returns of premium, which returns became due after the testator's death;(*x*) even though the policies were effected under a *del credere* commission.(*y*) And where a broker has effected policies in the name of his principal, under a *del credere* commission, he cannot set off losses which have happened on such policies, although those claimed are total, and he has accounted for them with his principal.(*z*) But where the broker has guaranteed the payment of an average loss adjusted by the plaintiff, (an underwriter,) to the persons insured under a *del credere* commission, he may set it off.(*a*)

If a balance of accounts be due from the principal to his

(*w*) Morris v. Cleasby, 4 Maule & Sel. 566.

(*x*) Houston v. Robertson, 2 Marsh. 138; S. C. 6 Taunt. 448. 4 Camp. 342. Holt, 88.

(*y*) Houston v. Bordenave, 2 Marsh. 141.

(*z*) Cumming v. Forrester, 1 Maule & Sel. 494.

(*a*) Wienholt v. Roberts, 2 Camp. 586.

factor, and the principal sue the factor on a bond, the latter may set off this balance, in Pennsylvania.(*b*)

A broker effecting a policy of insurance, being the common agent of the assured and the underwriter, while the premium remains in his hands for the one party and the policy for the other, if he receives notice of events which entitle the assured to a return of premium before action brought by the underwriter to recover the full premium, he is authorized to deduct such return, and only pay over the difference to the underwriter.(*c*)

The defendant, an insurance broker, being sued for premiums received by him on policies subscribed by the plaintiff, was allowed to set off a loss on one of those policies effected in the name of the defendant, at the request of a third person, on goods in which such third person was interested, but on which the defendant had a lien to a greater amount than the set off claimed.(*d*)

In an action of assumpsit, for goods sold and delivered, the defendant pleaded that the goods were sold and delivered to him by A., the factor and agent of the plaintiff, with the privity of the plaintiff, as, and for, the goods of A., and that defendant did not know that the goods were not the property of A.; that at the time of the sale and

(*b*) Stiles v. Donaldson, 2 Dall. 264. Read v. Ingraham, 3 id. 505.
(*c*) Shee v. Clarkson, 12 East, 507.
(*d*) Davies v. Wilkinson, 4 Bing. 573. 1 Moore & Payne, 502.

delivery A. was, and still is, indebted to the defendant in more than the value of the goods, and that the defendant was ready and willing to set off and allow to plaintiff the value of the goods, out of the monies so due and owing from A. It was held, on special demurrer, that the plea was good.(*e*)

5th. *Set off by, and against, husband and wife.*

A debt due to a man in right of his wife cannot be set off in an action against him on his own bond.(*f*) Nor can a debt due from a wife, *dum sola*, be set off in an action brought by the husband alone.(*g*) Unless he has promised to pay the debt, after marriage, and thereby made it his own.(*h*) So when the husband alone sues on a promissory note given to his wife, a debt due to the maker from the wife, *dum sola*, cannot be set off.(*i*) To a declaration in covenant by husband and wife as administratrix, a set off of money due by the intestate cannot be supported.(*k*) A debt due from the wife, *dum sola*, cannot be set off against a note given to the wife after marriage, if the husband elect to treat the note as his several property, as if he sue upon it in his own name, or indorse

(*e*) Carr v. Hinchliff, 4 Barn. & Cress. 547.
(*f*) Paynter v. Walker, Bull. N. P. 179.
(*g*) Wood v. Akers, 2 Esp.594.
(*h*) Id. Ib.
(*i*) Burrough v. Moss, 10 Barn. & Cress. 558.
(*k*) Warn v. Bickford, 7 Price, 550.

it over to a third party; and it is immaterial whether the wife join in the indorsement or not.(*l*)

The debt of a husband during coverture cannot be set off after divorce, against the distributive share of the wife in her father's estate, although the decree of divorce was subsequent to the death of the intestate.(*m*)

Where a legacy is given to the wife "for her own use," a debt due by her husband to the testator cannot be set off in an action by the husband and wife against the executors to recover the legacy.(*n*)

A judgment recovered by a woman while sole against A. may, on motion, be set off so far as the principal money and interest is concerned, against a judgment recovered against her and her husband personally, for a *devastavit*, committed by her as administratrix.(*o*)

6th. *Set off by and against partners.*

A balance due from one partner to another, upon a settlement of the partnership transactions, may be set off, provided the parties have agreed upon the balance due.(*p*)

(*l*) Borough v. Moss, 5 Man. & Ryl. 296.
(*m*) Fink v. Hake, 6 Watts, 131.
(*n*) Jannison v. Brady, 6 Serg. & Rawle, 466.
(*o*) Rutherford v. Crabb et ux, 5 Yerger, 112.
(*p*) Dana v. Barrett, 3 J. J. Marsh. Rep. 8. Sarchet v. Adm'rs of Sarchet, 2 Ham. Ohio R. 326. Fromont v. Coupland, 2 Bing. 170.

But a debt due from one partner to another, on the partnership account, cannot be set off unless a final balance has been struck and agreed to between the parties. Thus in an action brought by one of two partners against the other, on a separate transaction, the defendant cannot set off a balance which, during the continuance of the partnership, has been declared to be due to him, on a weekly settlement of partnership accounts. Therefore where the plaintiff and defendant had been engaged in running a coach from B. to L., the plaintiff finding horses for one part of the road, and the defendant for another; and the profits of each party were calculated according to the number of miles covered by his own horses; the plaintiff received the fares, and rendered an account thereof to the defendant every week; it was held that the plaintiff and defendant were partners in this concern, and that in an action by the plaintiff against the defendant upon a separate transaction, the defendant could not set off a balance which had been declared in his favor upon the weekly accounts.(*q*) So, in a late case in England, an injunction to restrain process on a bill of exchange given by one partner to another, on the ground of a set off, was refused where the alleged set off was in respect of plaintiff's interest in the partnership effects and profits, but no account had been taken.(*r*)

As mutual debts only can be set off against each other, the debts sought to be recovered and those sought to be set off must be due in the same right. A joint debt there-

(*q*) Fromont v. Coupland, 2 Bing. 170. 9 Moore, 319.
(*r*) Wartnaby v. Shuttleworth, 1 Lond. Jurist, 469.

fore cannot be set off against a separate debt, nor a separate debt against a joint one.(*s*) Thus, in an action on a policy of insurance effected by the plaintiff in his own name, but in which others are interested with him, the defendant cannot set off a debt due to him from the plaintiff only.(*t*) So in an action by the solvent partner and the assignees of a bankrupt partner, to recover monies paid by the latter after his bankruptcy, the defendant cannot set off a demand which he has against the firm to a larger amount.(*u*)

Where a partner delivers partnership property to a third person, who, knowing it to be partnership property, receives it in payment of his individual debt due from the partner delivering it to him, in an action by and in the name of all the partners against such creditor of the individual partner, for the price of the goods, the debt of the one partner is not a defence or set off against all the partners.(*v*)

In a suit, either at law or in equity, against two partners, the individual demand of one of the defendants against the plaintiff is not a subject of set off.(*w*) And *vice versa*.(*x*)

(*s*) McGillivray v. Simpson, 2 Car. & P. 320. Jones v. Fleeming, 7 Barn. & Cress. 217. Coxe's Rep. 2. 7 Conn. 221. 1 McCord, 7.

(*t*) Grant v. Royal Exchange Ass. Co., 5 Maule & Sel. 439.

(*u*) Thomason v. Frere, 10 East, 427. Staniforth v. Fellows, 1 Marsh. 184.

(*v*) Dob v. Halsey, 16 John. 34.

(*w*) Wasson v. Gould, 3 Blackf. 18.

(*x*) Ladue v. Hart, 4 Wend. 583.

But demands which are essentially, though not perhaps specifically, or in point of form, joint, may be set off against each other. Thus if a person give a note to his bankers for a debt due to them, and they afterwards indorse it to one of their members as his separate property; in an action by such indorsee against the maker, the latter may set off any sum due to him from his bankers, against the demand on the note: for here the demands were originally joint and mutual, and are not altered by the private arrangement of the partners.(*y*) So, money due for advances made by bankers to a customer, upon a bond given by the customer to one of the partners, in trust for the rest, may be set off against a debt from the firm.(*z*) So, it having been decided by the supreme court, in a late case,(*a*) that a suit might be maintained in the name of one of two partners of a law firm, where the particular business respecting which the suit was brought, was uniformly done in the name of the partner suing; it was further held that in such a suit a set off of a demand against the firm should be allowed. So where the demands are essentially separate. Therefore a debt due from one who was the only apparent trader may be set off in an action brought by himself and partners, if the defendant was ignorant of the partnership at the time the debt was contracted.(*b*) And clearly, although a mere

(*y*) Puller v. Roe, 1 Peake, 197.

(*z*) Crosse v. Smith, 1 Maule & Sel. 545.

(*a*) Platt v. Halen, 23 Wend. 456.

(*b*) Stracey v. Deey, 7 T. R. 361, n. 2 Esp. 469, n. Lord v. Baldwin, 6 Pick. 348: Rose v. Murchie, 2 Call. 400.

nominal partner contract a debt, yet, if it be contracted in the partnership name, such debt may be set off in an action by the firm.(*c*)

Although joint demands cannot ordinarily be set off against separate demands, or *vice versa*, yet where there is an express agreement between a firm and a person dealing with it, that the debts severally due from the members of the firm, to that person, shall be set off against any demands which the firm may jointly have on him, it has been held that such agreement will be binding.(*d*) So, it seems, that demands against individual members of a firm may be set off against demands of the firm, if the course of dealing of the firm in receiving such demands in payment is uniform, and so notorious, that individuals dealing with them must be supposed to have had reference to it in their transactions with the firm.(*e*)

A debt due from a partnership cannot be set off against an individual debt due to one of the partners from the defendant; although the notes and accounts of the firm have been transferred to such partner, and he has undertaken to pay the debts of the copartnership.(*f*) This, however,

(*c*) Teed v. Elworthy, 14 East, 213. See Booth v. Hodgson, 6 T. R. 405.

(*d*) Kinnersley v. Hossack, 2 Taunt. 128. Lovell v. Whitridge, 1 McCord, 7.

(*e*) Evernghim v. Ensworth, 7 Wend. 326.

(*f*) Sears v. Patrick, 23 Wend. 528.

was a case where the suit was brought by the assignee of the original partner, in his own name.

But a debt due to a defendant as a surviving partner may be set off against a demand on him in his own right; for by the death of his copartners, the debt is considered to be owing to him in his own right.(*g*) And conversely a debt due from the plaintiff as a surviving partner may be set off against a debt due from the defendant to the plaintiff in his own right.(*h*)

But where a surviving partner, as such, had obtained judgment, being insolvent, and having previously made an assignment, in trust for the benefit of his creditors, and the date of the partnership accounts did not appear, the defendant was not allowed to set off a debt due to him on a judgment obtained against the plaintiff personally.(*i*)

It has been decided in *Vermont*, in an action brought by a surviving partner, for a debt due to the firm, that the defendant might plead in offset any demand he had against the plaintiff individually, unless there was some equitable interest in another person which a court of law could protect.(*k*)

(*g*) Slipper et al. v. Stidstone, 5 T. R. 493. 1 Esp. N. P. Rep. 47. 2 T. R. 473. 1 Marsh. 184. 11 Serg. & Rawle, 48. 2 Missouri Rep. 60.

(*h*) French v. Andrade, 6 T. R. 552. Meader v. Scott, 4 Verm. Rep. 26.

(*i*) Waln v. Anthony, 5 Serg. & Rawle, 468.

(*k*) Meader v. Scott, 4 Verm. R. 26. Meader v. Leslie, 2 id. 569.

Where a surviving partner assigned over to the executors of the deceased partner all the partnership debts, and among others, a bond given to the partnership, it was held, in *North Carolina*, that in an action brought by the executors, in the name of the surviving partner, against the obligor, the defendant could not set off against the surviving partner, in his separate capacity, after the date of the assignment to the executors.(*l*)

And a similar decision has been made in *South-Carolina*. Where a surviving partner assigned over the property of the firm to enable him to take the benefit of the Insolvent Debtor's Act, the firm being insolvent; and the assignee commenced an action against an insurance company for dividends on some stock belonging to the partnership, which had accrued since the death of the other partner; and the insurance company offered as a set off the amount of a bill of exchange endorsed by the surviving partner after the death of his copartner, and which was discounted by the insurance company and returned protested, it was held that it was not admissible as a set off.(*m*)

7th. *Set off by and against principal and agent.*

In a suit by an agent, in his own name, for a debt due to his principal, a debt due from such principal to the defendant may be set off.(*n*) But in an action by an agent

(*l*) Hogg v. Ashe, Cam. & Norw. 8.
(*m*) White v. Union Ins. Co., 1 Nott & McCord, 556.
(*n*) Coppin v. Craig, 7 Taunt. 243.

who sues as principal, the defendant cannot set off a debt due to him from the principal.(o)

Where an auctioneer sues for the price of goods sold by him as such, the defendant may set off a debt due to him from the principal vendor.(p) But a defendant cannot set off a debt due from a principal against a claim by a broker who had advanced money on goods, and declared on a special contract respecting the sale of them, as his own goods, though the sale note mentioned the name of the principal.(q)

If an agent be permitted to deal as if he were a principal, the party dealing with him, and ignorant of his representative character, is entitled to the same rights against him as if he were the principal. So, that under such circumstances he may set off, in an action brought against him by the principal, a debt due from the agent to himself.(r) Thus, in an action of assumpsit for goods sold to the defendant by A. B. & Co., factors to the plaintiff, the defendant set off a debt due to him from A. B. & Co. upon another account; alleging that the plaintiff had not appeared at all in the transaction, and that credit had been given by A. B. & Co. and not by the plaintiff. Lord Mansfield said: "Where a factor dealing for a principal, but concealing that principal, delivers goods in his own name,

(o) Per Lord Mansfield, in Drinkwater v. Goodwin, Cowp. 251.
(p) Jarvis v. Chapple, 2 Chit. 387. Winchester v. Hackley, 2 Cranch, 342.
(q) Atkyns v. Amber, 2 Esp. 493.
(r) Bab. on Set Off, 44.

the person contracting with him has a right to consider him, to all intents and purposes, as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet the purchaser may set off any claim he may have against the factor, in answer to the demand of the principal."(*s*)

The right of set off in this case is founded upon the principle, that where the buyer has been led to contract under an impression that his contract is with a particular person, he cannot afterwards be defrauded of the rights which he has against that person, by the introduction of a third, to whom he was a stranger. It is clear, therefore, that this right can only exist in those cases in which the purchaser deals with the agent as a principal.(*t*)

A commission *del credere* has been held a presumptive proof of an agent dealing as principal.(*u*)

A demand against a private association or company cannot be set off against a note payable to the agents of such company, and prosecuted by them in their individual names, although the note was taken for the benefit of, and belongs to, the company.(*v*)

(*s*) Bayley v. Morley, 7 T. R. 360, n. (a). Rabone v. Williams, id. ib. George v. Clagett, id. 359.

(*t*) Bab. on Set Off, 45.

(*u*) George v. Clagett, 7 T. R. 359.

(*v*) Warner v. Barker, 3 Wend. 400.

8th. *Set off by and against trustees and cestuis que trust.*

The cases in which set offs are allowed in suits by or against trustees, are very clearly specified in the revised statutes:

"If the plaintiff be a trustee for any other, or if the suit be in the name of a plaintiff who has no real interest in the contract upon which the suit is founded, so much of a demand existing against those whom the plaintiff represents, or for whose benefit the action is brought, may be set off as will satisfy the plaintiff's debt, if the same might have been set off in an action brought by those beneficially interested."(*w*)

"In actions against executors and administrators, and against trustees and others sued in their representative character, the defendants may set off demands belonging to their testators or intestates, or those whom they represent, in the same manner as the persons so represented would have been entitled to set off the same in an action against them."(*x*)

These sections of the revised statutes, which are calculated effectually to protect the rights of *cestuis que trust* and trustees, as well as creditors, supply an omission in

(*w*) 2 R. S. 354, § 18, sub. 10.
(*x*) Id. 355, § 25.

the previous statute. By the statute respecting set offs, which was in force previous to the revised statutes, the rights of *cestuis que trust* and their creditors were entirely overlooked.

It is well settled in England that where an action is brought by or against a trustee, a set off may be made of money due to or from the *cestui que trust.*(*y*)

Thus, in a suit by an agent or trustee, for a debt due to his principal, any debt due from such principal to the defendant may be set off.(*z*) And where the plaintiff is a mere nominal party, having assigned the claim sued for to a third person, the defendant may set off a claim due to him from the assignee or person beneficially interested.(*a*)

But where the plantiff sues merely as the agent or trustee of a third person, and it was known to the defendant at the time when he entered into the contract which is the subject of the suit, that the plaintiff acted in that capacity, he cannot set off a demand due to him *from the plain-*

(*y*) Tidd's Pr. 9th Lond. ed. 666. Winch v. Keely, 1 T. R. 622. George v. Clagett, 7 id. 359. S. C. 2 Chit. Rep. 387. Coppin v. Craig, 7 Taunt. 243. S. C. 2 Marsh. 501. Carr v. Hinchliff, 4 Barn. & Cress. 547. S. C. 7 Dowl. & Ryl. 42.

(*z*) Coppin v. Craig, 7 Taunt. 243.

(*a*) Winch v. Keely, 1 T. R. 621.

(*b*) Gordon v. Church, Caines, 299. Wilson v. Codman's Ex'r, 3 Cranch, 193. 2 Caines' Cas. in Er. 341.

tiff.(*b*) And it is not necessary that the defendant should have had express notice of the trust. An implied notice is sufficient.(*c*)

A chose in action cannot be set off by a person to whom it is transferred, if he holds it merely as trustee for the person from whom he received it.(*d*)

A judgment recovered in the name of a trustee for the benefit of the *cestui que trust* may be set off against a judgment recovered by the defendant against the *cestui que trust*.(*e*)

In Pennsylvania, it has been held that a person having the *right of action* may set off a debt due to him as a trustee, against a debt due by him in his own right. And where there is not a *legal* right of action, but there has been an equitable assignment of the *property* in the chose in action, the *cestui que trust* may set off his right of property against a demand on him in his own right; and a debt due to or from the *cestui que trust* may be set off in an action commenced against, or by, a *trustee*, in right of the trust.(*f*)

(*c*) Anderson v. Van Allen, 12 John. 343.
(*d*) Fair v. McIver, 16 East, 130.
(*e*) Barrett v. Barrett, 8 Pick. 342.
(*f*) Wolf v. Beates, 6 Serg. & Rawle, 244.

CHAP. V.

PARTICULARS OF SET OFF.

In all cases where the defendant pleads or gives notice of a set off generally, without specifying the particulars thereof, the plaintiff has a right to call upon him for the particulars of such set off, or preclude him from giving evidence in support of it at the trial.(*a*)

In order to obtain this bill of particulars the plaintiff should procure an order from a judge or other officer authorized to grant the same, requiring the defendant's attorney to furnish such particulars by a certain day, or show cause why he should not do so, or in default thereof, be precluded from giving evidence of his set off on the trial. If no particulars are furnished nor cause shown, pursuant to the order, the plaintiff will then be entitled to an order that the defendant render a bill of particulars of his set off within a certain number of days, or be precluded from giving any evidence in support thereof.(*b*) If no particulars are rendered as required by the absolute order,

(*a*) 2 Archbold's Pr. 197. 3 John. 248. Graham's Pr. 439. 1 Burrill's Pr. 180, 191, 433.

(*b*) Graham's Pr. 440. 1 Burrill's Pr. 433. 1 Cowen's Rep. 573, n.

the plaintiff, upon an affidavit of the service of such order and of the non-delivery of the bill of particulars, may get an order from a judge or commissioner that the defendant be precluded from giving evidence of his set off at the trial. Or, by the operation of the absolute order itself, the defendant will be so precluded, on proving, at the trial, service of the order and the non-delivery of the particulars.(*c*)

If the defendant furnishes a bill of particulars which is insufficient, the plaintiff may obtain an order for further particulars;(*d*) or the defendant may obtain an order for leave to amend it.(*e*)

The effect of delivering a bill of particulars is to confine the defendant, on the trial of the cause, to proof of the items therein contained.(*f*) What degree of certainty is requisite in these particulars of the defendant's set off, is a point of some importance; and will be shown by referring to some of the decisions relating to particulars of the plaintiff's demand; the rules respecting which are also applicable to particulars of the defendant's set off.(*g*)

Where the bill of particulars furnished by the plaintiff stated his demand to be for goods sold and delivered *to*

(*c*) 1 Burrill's Pr. 433. Gra. Pr. 519. Swain v. Roberts, 1 M. & Rob. 452.

(*d*) Id. id.

(*e*) Id. 432. Tidd's Pr. 6th ed. 623. See 4 Cowen, 54.

(*f*) 2 Arch. Pr. 222. Gra. Pr. 514, 515. 1 Camp. 69. Peake's Cas. 172. 3 Esp. Rep. 165.

(*g*) See Gra. Pr. 439. 1 Burr. Pr. 483.

defendant, the plaintiff was not allowed, at the trial, to give evidence of goods sold *by* the defendant, as agent for the plaintiff.(*h*) So where the plaintiff's particulars stated various sums of money due by the defendant, but some of which were in fact owing from the defendant and his partner, and not from the defendant alone, and the defendant pleaded the non-joinder in abatement, the plaintiff was not allowed to give evidence of those due from the defendant, solely, because they were not distinguished from the others in the bill of particulars.(*i*) The bill should state the nature of the plaintiff's claim with sufficient particularity to enable the defendant to meet it at the trial. It should state the items of the demand, and when and how it arose. The dates of the items should be given with as much particularity as possible.(*k*) Therefore it was held that a bill of particulars delivered, in which the only dates were "from January, 1828, to January, 1834," was not a compliance with the order.(*l*) So it was held in another case, that evidence of work done in 1820, could not be given under a bill of particulars specifying items of work for which a recovery was claimed, to which was attached the date of 20th April, 1821.(*m*)

As the object, however, of this strictness is that the opposite party may know what will be attempted to be proved

(*h*) Holland v. Hopkins, 2 Bos. & Pul. 243; S. C. 3 Esp. Rep. 168.
(*i*) Colson v. Selby, 1 Esp. Rep. 452.
(*k*) Humphrey v. Cottelyou, 4 Cowen, 54.
(*l*) Swain v. Roberts, 1 M. & Rob. 452.
(*m*) Quin v. Astor, 2 Wend. 577.

against him at the trial, and may prepare his evidence accordingly, a mistake in the particular, not calculated to deceive or mislead him, will not be deemed material. Thus an error in the date of one of the items, was holden to be immaterial, because it could not have misled the defendant.(*n*) So where a payment made on account of the defendant to A., was stated, in the particular, to have been made to B., Lord Ellenborough said he should hold it to be immaterial, unless the defendant would make affidavit that he was misled by the particular.(*o*) So where, in debt for rent, the plaintiff, in his particular, described the premises as being in a different parish from that in which they really were situate, the court held the mistake to be immaterial, as the defendant could not have been misled by it.(*p*) So a bill of particulars furnished by a defendant, describing a joint and several note made by the plaintiff and another person, as a note made by the plaintiff, is sufficient to entitle the defendant to give the note in evidence, under a notice of set off.(*q*)

Where in an action by the assignee of an insolvent debtor for goods sold and delivered by the insolvent, the defendant relied on a set off, and in the notice delivered by him he set out a composition deed of assignment, by a former creditor of the defendant, to the insolvent, in which there was a covenant by the latter, guaranteeing to the de-

(*n*) Millwood v. Walter, 2 Taunt. 224.
(*o*) Day and others v. Bower, 1 Camp. 69, note.
(*p*) Davies v. Edwards, 3 Maule & Sel. 380.
(*q*) Standish v. Chandler, 23 Wend. 511.

fendant the payment of a dividend agreed to be paid on that occasion; and the notice also stated, as other grounds of set off, money had and received, and on an account stated, but in the particular of the set off the defendant stated the subject matter to be a sum of 34*l*. "the amount of two several dividends of five shillings in the pound upon a debt of 68*l*. due from Simon Pain to the defendant, which said dividends are directed to be paid by the said T. L. Pain, as in the said notice of set off particularly mentioned:" Held that the particulars of such set off confined the defendant to proof of the demand under the covenant in the deed of assignment as the sole ground of his defence; and precluded him from giving evidence of satisfaction of the demand of Pain, either by money had and received, or on an account stated, according to the terms of the notice of set off, or by any other means.(*r*)

A bill of particulars need not state the credit side of an account.(*s*) Nor need it be in any particular form.(*t*) And it will not be construed with the same strictness as a declaration. But delivering a particular as general as the declaration, would probably be deemed a contempt, and subject the attorney to costs.(*u*)

It is sufficient, in a bill of particulars, to refer to an ac-

(*r*) Andrews v. Bond, 8 Price, 213, 538.
(*s*) Ryckman v. Haight, 15 John. 222.
(*t*) Williams v. Allen, 7 Cowen, 316.
(*u*) See Brown v. Watts, 1 Taunt. 353.

count already delivered, without restating it.(*v*) And if a bill state the transaction upon which the defendant's claim arises, it need not specify the technical description of the right which results to the defendant out of such transaction.(*w*)

Although a party is confined, in his proof, to the items contained in his bill of particulars, yet if it appear from the evidence of the opposite party, that he is entitled to recover for items not included in the bill, he may recover for such items.(*x*) But an admission in the defendant's particular of set off cannot be used by the plaintiff as evidence in support of his claim. He must produce other evidence of it.(*y*)

At the trial the particulars of the plaintiff's demand, or of the defendant's set off, are considered as incorporated with the declaration, plea, or notice.(*z*)

An objection for variance between the bill of particulars and the proof, must be taken at the trial, and will not be heard afterwards.(*a*)

Where an order was obtained for the delivery of par-

(*v*) Hatchet and wife v. Marshal, Peake's N. P. Cas. 172. James v. Goodrich, 1 Wend. 289.

(*w*) Brown v. Hodgson, 4 Taunt. 189.

(*x*) Hurst v. Watkis, Camp. 68. 7 Cowen, 316.

(*y*) Harington and others v. McMorris, 5 Taunt. 228.

(*z*) Fleurot v. Durand, 14 John. 329. Ryckman v. Haight, 15 id. 222. Peake's N. P. Cas. 172.

(*a*) See 1 Burrill's Pr. 433.

ticulars of a set off within a fortnight, and they were not delivered for five weeks, but after the delivery an order was made, by consent, for the amendment of the declaration, this was held a waiver of the irregularity in the delivery of the particulars.(*b*)

A demand of particulars of a notice of set off delivered after a plea which was a nullity, is not a waiver of the plaintiff's right to sign judgment, for want of a plea.(*c*)

It is no objection to the use of particulars of set off that they are headed in a different court from that in which the suit is brought, if they have not been delivered pursuant to a judge's order.(*d*)

In Pennsylvania, a defendant who *pleads* a set off is not bound to furnish a bill of particulars thereof, unless the same is demanded; but the rule is otherwise if he intends to give it in evidence under the general issue.(*e*) If the plaintiff takes issue on a general plea of set off, it is not necessary for the defendant to give notice of the matter intended to be set off.(*f*)

(*b*) Wallis v. Anderson, Moo. & Mal. 291.
(*c*) Ford v. Barnard, 6 Bing. 534.
(*d*) Lewis v. Hilton, 5 Dowl. P. C. 267.
(*e*) Clay v. Karsper, 1 Browne, 254.
(*f*) Commis'rs of Berks v. Ross, 3 Binn. 539.

CHAP. VI.

PLEADING, VERDICT, AND JUDGMENT.

Until recently it was the law in England that when either the plaintiff's or defendant's demand accrued by reason of a *penalty*, the debt intended to be set off must be pleaded in bar; and the defendant was obliged to aver in his plea what was really due. But in all other cases the defendant might either plead, or give notice of set off at his election.(*a*) By the New Rules of Hilary Term, 4 Will. 4, however, it is required that a set off be now pleaded in all cases.(*b*)

By the Revised Laws of 1813, which were in force in this state at the time the Revised Statutes were passed, a set off could not be pleaded. It could only be taken advantage of by notice, with the general issue.(*c*)

(*a*) 1 Tidd's Pr. 667. 2 Bur. 1231. Bul. N. P. 179.
(*b*) See Graham v. Partridge, 1 Mees. & Wels. 395.
(*c*) 1 R. L. 315. Williams v. Crary, 5 Cowen, 368. Alsop v. Caines, 10 John. 399. S. C. 13 id. 24.

Under the Revised Statutes a defendant may either plead or give notice of his set off, at his option.(*d*)

But he cannot do both.(*e*)

1st. *Plea of Set Off.*

Where a set off is pleaded specially, the plea should not only contain all the requisites essential to the validity of other pleas in bar, but must describe the debt intended to be set off with the same degree of certainty as is required in a declaration for a like demand.(*f*)

Where a set off is pleaded of a debt *equal* to the plaintiff's demand, the defendant may conclude his plea with a prayer of judgment, if the plaintiff should maintain his action; which is the common conclusion of pleas in bar; for a set off to an amount equal to the plaintiff's demand, if duly established, will entitle the defendant to a judgment that the plaintiff take nothing by his action.(*g*)

Where the defendant's set off is *less* than the plaintiff's debt or demand, and the defendant in his plea acknowledg-

(*d*) 2 R. S. 355, § 19.

(*e*) Rule 85 Supreme Court. Graham's Pr. 2d ed. 246.

(*f*) 1 Chit. on Plead. 562. It should set forth, with reasonable certainty the grounds of the plaintiff's liability. Irwin v. Potter, 3 Watts, 271. It should have the substantial requisites of a declaration. 5 Monroe, 84.

(*g*) 2 R. S. 355, § 21. See Cook v. Dixon, Bull. N. P. 179.

es it to be so, the plea should conclude with a prayer that the defendant's demand may be deducted from that of the plaintiff's, and that the plaintiff have judgment for the residue only.(*h*)

Where the defendant's set off *exceeds* in amount the plaintiff's debt or demand, the plea should conclude with a prayer that judgment may be rendered in favor of the defendant for the balance.(*i*) But no judgment can be rendered against the plaintiff, on a plea of set off, when the contract which is the subject of the suit has been assigned before the suit was brought; nor for any balance due from any other person than the plaintiff in the action.(*k*)

The statute requiring that the demand to be set off should have existed at the time of the commencement of the suit, and have then belonged to defendant,(*l*) the plea should state that the plaintiff was indebted to the defendant "before and at the time of the commencement of this suit, and still is indebted." And a plea in which it is stated that "the plaintiff, before and at the time of the plea pleaded, was indebted," will be bad on general demurrer.(*m*) So

(*h*) 2 R. S. 351, § 21.

(*i*) See id. § 22.

(*k*) Id. ib.

(*l*) See 2 R. S. 354, § 18, sub. 4.

(*m*) 1 Selw. N. P. 4th Am. ed. 133. Evans v. Prosser, 3 T. R. 186. Morrison v. Moreland, 15 Serg. & Rawle, 61. Shepherd v. Turner, 3 McCord, 249. *Actio non* goes to the commencement of the suit, and not to the time of the plea pleaded. Selw. N. P. 133. In England the rule on this subject is this: If the debt intended to be

a plea of set off, which states that "before and at the time of the commencement of the action, the plaintiff was indebted to the defendant," &c. without inserting the words "and still is indebted," is bad on demurrer.(*n*) For it is necessary that the debt to be set off should be due to the defendant at the time of the plea pleaded, as well as that it should have been due at the commencement of the suit.

A plea of set off to the whole declaration of several counts is not divisible; and the jury therefore cannot find thereon as to one count for the plaintiff, and as to the others, for the defendant.(*o*)

A plea of set off of money due upon a recognizance, and also for money due upon promises, pleaded to an action of *debt*, as if to an action of *assumpsit*, is a complete nullity, and the plaintiff may sign judgment as for want of a plea.(*p*)

A plea of set off so much resembles a declaration, that

set off accrued before action brought, the plea of set off should state that plaintiff was indebted to defendant at the commencement of the action. If the debt intended to be set off accrued after action brought, and before plea pleaded, then the plea of set off should be pleaded in the form of a plea *puis darrein continuance*, viz. that the plaintiff ought not *further* to have or maintain his action. Id. ib. note (99).

(*n*) Dendy v. Powell, 3 Mee. & Wels. 442. 6 Dowl. P. C. 577, S. C.

(*o*) Moore v. Butlin, 2 Nev. & Perry, 436. 7 Adol. & Ellis, 595, S. C.

(*p*) Penfold v. Hawkins, 2 Maule & Sel. 606.

two parts of it are considered as two counts in a declaration; and if one part is good, a general demurrer to the whole will be bad. And in this the plea of set off differs from other pleas in bar; for, generally, if one part of a plea in bar is bad, the whole is considered so.(q)

Thus, in *Dowsland* v. *Thompson and others*,(r) which was an action of assumpsit for the freight of goods, the defendant pleaded first, the general issue; and secondly, by way of set off, damage done to the goods while on board the vessel, by the negligence of the plaintiff, and a demand for work and labor, money had and received, &c. To the second plea the plaintiff demurred, and assigned, for cause, that the damage done to the goods being unliquidated, could not be the subject of a set off. And it was contended for the plaintiff that nothing could be set off but that for which an action of debt would lie; and that as both parts of the second plea were to be considered as making only one plea, the general demurrer was good, though the cause assigned extended only to the first part of the plea. But the court held that the demurrer to the whole plea was wrong, for that the latter part was certainly good, and the different parts were to be considered as different counts in the same declaration.

A judgment may be pleaded by way of set off, although a writ of error be depending thereon.(s)

(q) Bab. Set Off, 83.

(r) 2 W. Black. Rep. 910.

(s) Reynolds v. Beerling, 1 Tidd's Pr. 716. 4 Doug. 181. 1 id. 112.

In an action on a bond, the defendant must set forth in his plea what is really due on the bond, before he is entitled to set off any cross demand under the statute; and such averment being material is traversable, even though it be laid under a *videlicet*.(*t*)

Where the defendant's demand is founded upon a bond or other contract having a penalty, the penalty cannot be set off; but only the sum equitably due by virtue of its condition.(*u*) The plea, therefore, should state what is due according to the condition. Where to an action of debt on bond the defendant pleaded a set off, and that 1100*l*. was due, and no more, and the plaintiff replied generally that a larger sum was due, to wit, the sum of 1750*l*., it was ruled that the plaintiff was bound to prove that more than 1100*l*. was due.(*v*)

But a bond debt of the plaintiff's, assigned to the defendant by another, to whom and for whose use it was originally given, cannot be pleaded, by way of set off. Thus, in *Wake* v. *Tinkler*,(*w*) which was an action of assumpsit on a promissory note, the defendant pleaded, by way of set off, a bond executed by the plaintiff to one William Atkinson, conditioned for the payment of a sum of money, which bond was assigned by the said William Atkinson to

(*t*) Symmons v. Knox, 3 T. R. 65. Grimwood v. Barritt, 6 T. R. 460.

(*u*) 2 R. S. 354, § 18, sub. 1.

(*v*) Holt's N. P. 293. Tidd's Pr. 667.

(*w*) 16 East, 36.

the defendant, and was then unsatisfied. To this plea there was a demurrer; and the court of king's bench held that they had nothing to do with any other than legal rights, and could not notice an equitable assignment; and judgment was therefore given for the plaintiff.

A plea of set off of a particular amount is not supported by proof of a set off of a less amount; but the plea may be taken distributively, and found, as to the part not proved, for the plaintiff, and as to the part proved, for the defendant. And if, upon the finding on a plea of *nunquam indebitatus*, it appear on the record that the plaintiff is not entitled to recover a larger sum than is covered by the proof given under the defendant's pleas, the defendant is entitled to judgment on the whole record.(*x*) A defendant pleading payment and a set off who is unable to prove the full amount mentioned in each of the pleas, but proves sufficient to form an aggregate equal to the plaintiff's demand, will be entitled to have judgment on the whole record.(*y*)

It would seem that two pleas of set off may be pleaded to two several counts of a declaration; or if demurrable, it must be on the ground of misjoinder.(*z*)

To a declaration in assumpsit, the defendant pleaded a set off for the arrears of rent alleged to be due by the plain-

(*x*) Cousins v. Paddon, 2 Cromp., Mee. & Ros. 547. S. C. 4 Dowl. P. C. 488. 5 Tyr. 536. 1 Gale, 305.

(*y*) 4 Dowl. P. C. 488, S. C.

(*z*) Gibson v. Bell, 2 Scott, 721. 1 Hodges, 136.

state, must be in the form of a plea of payment—setting out, in the conclusion, the matters of set off.(*i*) It is not necessary that such a plea should show that the amount claimed as a set off is equal to the plaintiff's demand.(*k*)

In assumpsit, on a promissory note made payable to W., a plea of offset of an acconnt due defendant by W. & D., partners, is bad on demurrer.(*l*)

A plea of set off should disclose a state of facts such as would entitle the party pleading it to his action if he were plaintiff in the prosecution of a suit; otherwise the plea will be bad on demurrer.(*m*)

By the "act concerning costs and fees in courts of law, and for other purposes," passed May 14th, 1840, it is enacted that "in actions upon contract upon any written instrument or record, if the plaintiff shall describe the written instrument or record in the declaration, or annex a copy thereof to the declaration, unless the defendant verify his plea by affidavit, or annex thereto an affidavit of merits, in such form and manner as the supreme court shall prescribe, such plea may be disregarded by the plaintiff, and

(*i*) Young v. Harry, 4 Blackf. 167. Coe v. Givan, 1 id. 368.
(*k*) Hurd v. Earl, 4 Blackf. 184.
(*l*) Von Theel v. Connally, 9 Porter, 452.
(*m*) Crawford v. Ex'rs of Simonton, 7 Porter, 110.

he may proceed to judgment, in the same manner as if no plea had been served."(*n*)

In order to carry out the principle of this section, the supreme court have adopted rule 1st, of May 28th, 1840, which is as follows: "In actions upon any written instrument or record which shall be described in, or a copy of which shall be served with the declaration, the plaintiff may disregard any plea in bar concluding to the country, unless the same shall be accompanied by an affidavit that the defendant has fully and fairly stated the case to —— of ——, his counsel, and that he has a good and substantial defence on the merits, to the whole or some part of the plaintiff's demand on the bill of exchange, promissory note, or other written instrument, or the judgment, recognizance, or other record on which the action is brought, as he is advised by his said counsel and verily believes to be true. The plaintiff may also disregard any plea in bar, concluding with a verification, unless the same shall be accompanied by an affidavit that the defendant verily believes the plea to be true in substance and matter of fact.

When a sufficient reason is shown why the affidavit is not made by the defendant, the same may be made by his counsel, attorney, or agent, stating particularly his means of knowledge in relation to the defence or plea."

(*n*) Laws of 1840, p. 333, § 17.

The above section of the statute, and rule of court, of course apply to pleas of set off, and to cases where it is intended to give a set off in evidence, upon notice, under the general issue. It is therefore necessary in such cases, if the suit is brought in the supreme court upon a written instrument or record, and in the manner mentioned in the statute, that the defendant should annex an affidavit of merits to the plea of the general issue, if that alone is pleaded; and in case he pleads his set off specially, his special plea should be accompanied by an affidavit of its truth.

2d. *Notice of set off.*

Where the defendant chooses to give notice of his set off, instead of pleading it, such notice may be given together with the plea of the general issue, in those actions in which such issue may be pleaded, or with the plea of *nil debet* to an action of debt on judgment, or in the action of covenant, with a plea denying the execution of the instrument on which the plaintiff has declared.(o)

By the revised laws of 1813, which were in force at the time the revised statutes were adopted, the notice of set off was required to be given with a plea of the *general issue*. Doubts having arisen under this section of the statute, whether *non est factum* in covenant, and *nil dicit* in debt on judgment, were pleas of the general issue, the above

(o) 2 R. S. 355, § 20.

section was introduced into the revised statutes to place the matter beyond all question.(*p*)

As there is nothing in the statute restricting the defendant's right to take advantage of his set off by giving notice thereof, to cases where the general issue *alone* is pleaded, it seems clear that such notice may be given where several pleas are pleaded ;(*q*) although it is said to be the more usual course, in England, where there is another special plea on the record, to plead the set off.(*r*) The revised statutes allow the defendant in any action to plead as many several matters as he shall think necessary for his defence ; subject to the power of the court to compel him to elect by which plea he will abide, in cases where he pleads inconsistent pleas.(*s*) But a construction of the section relative to notices of offset which should prevent a defendant from giving such notice where he pleads other pleas than the general issue, would operate as a restriction upon this right to plead double ; and cannot therefore, as it seems to us, be correct. Had it been the intention of the legislature thus to narrow down the rights of defendants, it would probably have prohibited them, in express terms, from pleading double where they chose to give notice of set off ; or from giving notice of set off in connection with any *other* plea than the general issue.

(*p*) See Rev. Notes ; 8 John. 82 ; 1 Stark. N. P. Rep. 311. Bab. on Set Off, 76.

(*q*) Bab. on Set Off, 78. Coulson v. Jones, 6 Esp. Ni. Pri. Rep. 59. But see Webber v. Vann, Ry. & Moo. 413 ; S. C. 2 Car. & P. 310.

(*r*) Bab. on Set Off, 78.

(*s*) 2 R. S. 352, § 9.

Under the English statutes of set off, previous to the adoption of the New Rules, a defendant was allowed to give notice of his set off, although several pleas were pleaded.(*t*) Thus, where in an action of assumpsit for goods sold and delivered, the defendant pleaded *non assumpsit* as to all the money claimed by the declaration, except as to 6*l.* 19*s.*, and as to that a tender, and gave notice of set off; at the trial it was objected that the defendant could only give notice of set off when there was the single plea on the record of the general issue, and that there being a special plea of tender, evidence of set off was inadmissible; for that if the defendant had intended to avail himself of it, he should have pleaded it as a distinct plea. Lord Ellenborough, after referring to the words of the statute, said he was of opinion that the evidence was admissible; and that in every case of a general issue pleaded, and notice given of it, a set off could be given in evidence. There were no restrictive words in the statute confining it to a single plea of the general issue; that though the common mode of pleading was to plead a set off, when there was another special plea on the record, it rather proved that it was done as a matter of convenience, to save the trouble of delivering and proving a notice of set off, which a plea saved; and where a rule to plead several matters was necessary, convenience pointed it out as a matter desirable, to add the plea of set off instead of giving a notice, as both might be included in the same rule; there appeared,

(*t*) Bab. on Set Off, 78. 2 Chit. Pl. 474, note (h), 3d ed. But see Webber v. Venn, 2 Carr. & Payne, 310; Ry. & Moo. 418.

therefore, to him, no legal objection whatever to the admission, and that the statute appeared to warrant it. It was therefore admitted.(*u*) Under the New Rules, however, in England, as we have before stated, a set off must now be pleaded in all cases.(*v*)

The notice of set off, as we have already stated, should regularly be given with, and at the time of pleading, the general issue. Though if it be not then given, the court, on motion, will give the defendant leave to withdraw the general issue, and plead it again with a notice of set off.(*w*) And such notice may be given with the general issue, after the defendant has been ruled to abide by his plea.(*x*)

In point of form, a notice of set off should be almost as certain as a declaration. Therefore where, in an action of *indebitatus assumpsit*, the notice of set off was in these words: "Take notice that you are indebted to me for the use and occupation of a house, for a long time held and enjoyed and now lately elapsed," it was deemed insufficient. Lord Hardwick, C. J., said, "The legislature intended these notices of set off to be in the nature of cross actions, and they should be expressed with such certainty as to enable the plaintiff to make a proper defence to them." Had this been a declaration for the use and oc-

(*u*) Coulson v. Jones, 6 Esp. Ni. Pri. Rep. 50.
(*v*) Graham v. Partridge, 1 Mee. & Wels. 395.
(*w*) 2 Stra. 1267. Tidd's Pr. 668.
(*x*) 1 Term Rep. 693, 4, in notes.

cupation of a house, it would certainly have been ill; for it must have shown the commencement and determination of the occupation. And it afterwards appearing that the debt intended to have been set off was rent reserved on a lease by indenture, which was not mentioned in the notice, the chief justice said it was bad on that account also; for if this had been shown, the plaintiff might probably have proved an eviction, or some other matter to avoid the demand.(y) Reasonable certainty in a notice has been held sufficient, in Pennsylvania.(z)

Where the notice of set off is for money paid to the use of the plaintiff generally, and it appears to have been paid in taking up promissory notes of the plaintiff, such general notice is sufficient, without setting out the special matter in the notice of set off.(a) But where there are any very special circumstances attending the defendant's demand, the notice should be special, that the plaintiff may not be taken by surprise. Thus in an action for goods sold and delivered, the defendant pleaded the general issue, with notice of set off. The set off was in the common form, "that the plaintiff was indebted to him in a larger sum than that claimed by the plaintiff, to wit, in 100*l.* for money had and received, 100*l.* for goods sold and delivered, &c." going through the common counts.

(y) Fowler v. Jones, Bull. N. P. 179. 1 Sel. N. P. 4th ed. 146. See 2 Esp. Rep. 560, 569.

(z) Gogel v. Jacoby, 5 Serg. & Rawle, 117. Lewis v. Culbertson, 11 id. 48.

(a) Ord v. Ruspini, 2 Esp. N. P. Rep. 569.

counts. That part of the defendant's case upon which he meant to rely in support of his set off, his counsel proposed to make out in the following manner : The defendant had, for a considerable time before, dealt with the plaintiff and had paid him several bills for articles furnished by the plaintiff in the course of his trade, to the defendant. These bills the defendant now pretended to have been over-charged, and liable to very considerable deduction ; and these over-payments he proposed to prove, and to set off against the demand claimed by the plaintiff in the present action. This was opposed by the plaintiff's counsel, on the ground that the accounts upon which these payments had been made having been settled, could not now be opened ; but that if they could, it should have been made the object of a special set off, and could not be claimed under the general notice. Eyre, Ch. J., said he was of opinion that it could not be given in evidence, under the common notice of set off. It was taking the plaintiff by surprise ; and if the defendant meant to have availed himself of it, it should have been the object of particular notice. The evidence was therefore rejected.(*b*)

So to an action on a contract containing mutual covenants, the defendant, in order to take advantage of any breaches on the part of the plaintiff, by way of set off, must specify the breaches particularly in his notice.(*c*)

(*b*) Hampton v. Jarratt, 2 Esp. Rep. 560.
(*c*) Maverick v. Gibbs, 3 McCord, 315.

On a plea of *non assumpsit* and notice of set off, in an action for goods sold and delivered, a witness was called to prove a conversation with the plaintiff, in which the latter proposed to refer the matters in dispute between him and the defendant to the arbitration of the witness; but this being refused, the plaintiff admitted that he had received on account of the defendant 8000*l.*, which sum was more than sufficient to cover the demand in the action: *held* that this conversation was admissible in evidence under the notice of set off, and ought not to have been rejected as an offer of compromise, although the plaintiff expressly requested the witness to state the conversation to the defendant, to induce him to a compromise.(*d*)

In an action on a promissory note, by the indorsee against the maker, the defendant pleaded *non assumpsit*, and payment as to all except 40 cents; and payment of the 40 cents to the payee of the note before it was endorsed; and gave notice of a set off of large sums of money paid to the payee, and other sums due to him from the payee for goods sold and delivered; *held* that the defendant could not set off more than the sum pleaded.(*e*)

Where the defendant offers to set off a demand against the plaintiff which accrued more than six years before the commencement of the suit, it is not necessary that the defendant, in his notice annexed to his plea, should state a

(*d*) Thompson v. Austen, 2 Dow. & Ry. 358.
(*e*) Prior v. Jacocks, 1 John. Ca. 169.

promise to pay within six years.(*f*) Nor is it an objection that the demand offered to be set off was not originally due to the defendant, but had been assigned to him.(*g*)

The notice of set off is usually written under the plea, and delivered therewith to the plaintiff's attorney; and a copy of the notice should be kept by the defendant's attorney; it being necessary to prove the delivery of it at the trial of the cause.(*h*)

The defendant will be so far bound by his notice of set off, that on the trial he cannot give evidence in contradiction of it.(*i*)

A notice of set off need not expressly claim a balance in the defendant's favor, in order to warrant his recovering one. It is sufficient for this purpose that it set forth his demand in the usual form.(*k*)

3d. *Replication.*

The plaintiff may, by his replication, either take issue on the amount of the debt alleged to be due to himself, or he may deny the defendant's set off; and if the plaintiff

(*f*) Martin v. Williams, 17 John. 330.
(*g*) Id. ib.
(*h*) 1 Tidd's Pr. 668, 9th Lond. ed.
(*i*) Gogel v. Jacoby, 5 Serg. & Rawle, 117. Lewis v. Culbertson, 11 id. 48.
(*k*) The People v. The Judges of Onondaga, 4 Cowen, 21.

reply that more was due him than the sum set forth in the defendant's plea, and fail in the proof of that allegation, he will be nonsuited.

Thus in an action of debt brought upon two bonds given by the defendant to the plaintiff, one for 800*l.* and the other for 30*l.* the defendant pleaded *non est factum* and a set off; in his plea of set off he admitted 1100*l.* to be due to the plaintiff, and no more; of which sum of 1100*l.* he undertook to discharge himself by his set off. The plaintiff replied generally that more than 1100*l.* was due, to wit, the sum of 1750*l.*; and at the trial it was contended that it was incumbent on the plaintiff to prove that more than 1100*l.* was due from the defendant. Gibbs, Ch. J. said, "If the defendant plead a set off to debt on bond, he is bound to state the precise sum due upon the bond, before he can set off any cross demand. He has admitted that 1100*l.* the amount of the two bonds, is due, and he undertakes to discharge himself of that by his set off. The issue which the plaintiff has taken is that more than 1100*l.* was due, to wit, the sum of 1750*l.*; but that is pleaded under a scilicet. I am of opinion, therefore, that the plaintiff must prove that more than 1100*l.* was due." The defendant's counsel proved a set off to the amount of 1100*l.* and the plaintiff was nonsuited.(*l*)

If the plaintiff reply *nunquam indebitatus* to a plea of

(*l*) Bell v. Shaw, Holt's N. P. C. 292.

set off, and the defendant proves the plea, the plaintiff will not be at liberty, under his replication, to show that the sum proved, or even any part, has been *paid*.(*m*)

To a plea of set off the plaintiff may reply the statute of limitations.(*n*) But where the demands of both the plaintiff and defendant accrued more than six years before the time of pleading, and the plaintiff has issued process to prevent the statute of limitations from affecting his demand, it will also prevent the statute from affecting the defendant's demand, although he has issued no process.(*o*)

A replication of the statute of limitations to such a plea, does not admit the *amount* stated in the plea. That must be proved by the defendant.(*p*)

A replication to a plea of set off, stating that the defendant had brought an action against the plaintiff for the same sum, in which the plaintiff had paid the amount of the demand into court, was held bad, on general demurrer.(*q*)

If a plaintiff wishes to avoid a note produced by the de-

(*m*) Brown v. Danberry, 4 Dowl. P. C. 585.

(*n*) Remington v. Stevens, 2 Stra. 1271. Bull. N. P. 180. Alsop v. Nichols, 9 Conn. Rep. 357. Martin's North Car. Rep. 60.

(*o*) Ord v. Ruspini, 2 Esp. Ni. Pri. Rep. 569. Catling v. Skoulding, 6 T. R. 189.

(*p*) Gray v. Lawridge, 2 Bibb, 285.

(*q*) Evans v. Prosser, 3 T. R. 186.

fendant as a set off, as being given for a gaming consideration, he must reply such objection specially.(*r*)

Where a defendant produces an assigned note of the plaintiff as a set off, the plaintiff may show a total or partial failure of the consideration for which the note was given, either by a replication to the plea of set off, or in answer to the general issue and notice of set off.(*s*)

A., assignee of B., sued C. on a promissory note given by the defendant to B., for $197,79. Plea of payment to B., with notice of set off. The plea showed that at the date of the note, B. owed C. more than the amount of the note. Replication that B. was indebted to A. in the sum of $500, and had a quantity of furs worth $800, a part of which, to the value of $300, he was about to sell to A. in part payment of the debt due to him; that B. and C. then agreed, with A.'s consent, that C. should buy the whole of the furs and give, in part payment, his note to B. for $300, to be transferred by B. to A., without its being subject to the demands of C. against B., and that C. would pay the note to A.; that the note in question was made and assigned in pursuance of that agreement: held, on general demurrer, that the replication was good.(*t*)

In North Carolina, a plea of set off is considered in the

(*r*) Baldwin v. Brogden, 2 Stewart's Rep. 9.
(*s*) Hudson v. Tindall, 1 Stew. & Porter, 237.
(*t*) Hanna v. Ewing, 3 Blackf. 34.

nature of a cross action, and the plaintiff may reply several matters thereto.(*u*)

Where, in a suit by an indorsee of a promissory note, the defendants pleaded a set off, averring that the note was the property of the payee, that the plaintiff was a mere nominal party, and that the note was transferred to him for the purpose of depriving the defendants of their set off; and the plaintiff replied simply that the note was his property and not the property of the payee, without traversing the corrupt transfer of the note; it was held that by the pleadings the plaintiff was to be considered as having admitted the corrupt transfer of the note and the existence of the set off.(*v*)

To a plea of set off of a sum due under a recognizance, and also of another sum upon a simple contract, it seems that a replication protesting that the plaintiff did not acknowledge, &c. and then protesting that he was not indebted in manner and form as the defendant had, in pleading alleged, and concluding to the country, is bad; inasmuch as it refers matters of record to the cognizance of a jury. But as it was a sham plea, the plaintiff had leave to amend without payment of costs.(*w*)

(*u*) Worth v. Fentress, 1 Dev. 419. 1 Mur. 154.
(*v*) Savage v. Davis, 7 Wend. 223.
(*w*) Solomons v. Lyon, 1 East, 369.

4th. *Verdict and Judgment.*

Where the defendant has a set off against the plaintiff, and does not appear at the trial, the plaintiff may either take a verdict for the whole sum he proves due, subject to be reduced to the sum due on the balance of accounts, if the defendants will afterwards enter into a rule to bring no action for the set off, or he may take a verdict for the smaller sum, with a special endorsement on the postea, as a foundation for the court to stay proceedings, if another action should be brought for the amount of the set off.(*x*)

Where an action is brought upon a specialty, the condition of which is for the payment of an annuity or growing sum, and the defendant pleads a set off, the judgment must be entered for what is due, and the penalty will remain as a security against future breaches.(*y*)

Where in an action on a promissory note for 30*l*. the plaintiff took a verdict for the whole, and the defendant had at the same sittings an action against the plaintiff for 11*l*., to which there was a notice to set off the note of hand; the court held that, notwithstanding the verdict, the note of hand might be set off; for if at the time of the action brought, there were mutual demands, they, by the statute, might be set off; and that a remittitur ought to be

(*x*) Laing v. Chatham, 1 Chit. 178, n. 1 Camp. 252.
(*y*) Collins v. Collins, 2 Burr. 820.

entered on the first record, as to so much, by which means justice would be done.(z)

If the defendant's set off reduces the plaintiff's demand under 40*s*., the defendant will not thereby be entitled to enter a suggestion on the roll, in order to obtain costs, if it appears that a sum exceeding 40*s*. was due to the plaintiff at the time the action was brought, and before the defendant's demand was set against it.(a)

Where, under a plea of set off to the whole declaration, the defendant proves a debt less than the amount of the plaintiff's claim, he is not entitled to have a verdict entered for him on the issue, for the amount he has proved ; but where the plaintiff's claim has been partly answered by other pleas, and the defendant proves a set off exceeding the part unanswered, he is entitled to have a verdict entered for him on the plea of set off.(b)

The following are the provisions of the revised statutes of this state respecting the judgment upon a plea or notice of set off :

"If the amount of the set off duly established be equal to the plaintiff's debt or demand, judgment shall be enter-

(z) Baskerville v. Brown, 2 Burr. 1229. Bull. N. P. 180.
(a) Pitts v. Carpenter, Stra. 1191. Gross v. Fisher, 3 Wils. 48.
(b) Tuck v. Tuck, 5 Mee. & Wels. 109. 7 Dowl. P. C. 373. See Kilner v. Bailey, 5 Mee. & Wels. 382.

ed, that the plaintiff take nothing by his action; if it be less than the plaintiff's debt or demand, the plaintiff shall have judgment for the residue only.

If there be found a balance due from the plaintiff in the action, to the defendant, judgment shall be rendered for the defendant for the amount thereof; but no such judgment shall be rendered against the plaintiff, when the contract which is the subject of the suit shall have been assigned, before the commencement of such suit, nor for any balance due from any other person than the plaintiff in the action.

Wherever a set off is established in a suit brought by executors or administrators, the judgment shall be against them in their representative character, and shall be evidence of a debt established, to be paid in the course of administration; but execution shall not issue thereon until directed by the surrogate who granted letters testamentary or of administration."(c)

In suits on bills of exchange and promissory notes, the plaintiff is authorized, by statute, instead of bringing separate suits against the drawers, makers, endorsers, and acceptors, to include all or any of such parties to the bill or note in one action, and to proceed to judgment and execution in the same manner as though all the defendants were joint contractors.(d) And in any such action, any person

(c) 2 R. S. 355, §§ 21, 22, 24.
(d) Id. 274, 2d ed. § 6.

or persons sued may set off his or their demands against the plaintiff, in the same manner as if such defendants had been sued in the usual manner.(*e*) "If upon the trial of any such action the whole amount of the demands set off by any or all of the defendants and allowed by the jury or referees, shall be equal to, or shall exceed, the amount of the plaintiff's demand as proved on the trial, the jury or referees shall find a verdict or make a report in favor of the defendants generally: but if the jury or referees shall allow any demand as a set off, and shall still find or report a balance in favor of the plaintiff, they shall state in their verdict, or certify in their report, the amount which they allow to each defendant as a set off against the plaintiff's demand."(*f*)

(*e*) 2 R. S. 2d ed. 275, § 9.
(*f*) Id. ib. § 10.

CHAP. VII.

SET OFF IN EQUITY.

Courts of law and equity follow the same *general* doctrines on the subject of set off.(*a*) This is the rule independent of any statute. It is, however, expressly provided by the revised statutes, that in suits in chancery for the payment or recovery of money, set offs shall be allowed in the same manner, and with the like effect, as in actions at law.(*b*)

But the court of chancery, even before any statute of set off, was in possession of the doctrine of set off, and acted upon it as grounded upon principles of natural equity.(*c*) It seems, however, that antecedently to the statutes of set off, courts of equity did not exercise any jurisdiction on the subject, unless some equity intervened, independently of

(*a*) Duncan v. Lyon, 3 John. Ch. R. 358. Jackson v. Robinson, 3 Mason, 136. Elder v. Lasswell, 2 Blackf. 349. Van Buren v. Van Gaasbeck, 4 Cowen, 496. 7 Porter, 549. Ex parte Flint, 1 Swans. 30. McDonald v. Neilson, 2 Cowen, 174, per Woodworth, J.

(*b*) 2 R. S. 174, § 40.

(*c*) Ex parte Stephens, 11 Ves. 26.

the fact of mutual, unconnected debts.(*d*) As to connected accounts of debt and credit, it is certain that both at law and in equity, and without any reference to the statutes, or the tribunal in which the cause was depending, the same general principle prevailed, that the balance of the accounts only, was recoverable; which was therefore a virtual adjustment and set off between the parties.(*e*) Previous to the statutes, courts of equity acted upon the principles of set off in cases where the law could not give a remedy in a separate suit, in consequence of the insolvency of one of the parties. Thus, in *Hawkins* v. *Freeman*,(*f*) which was decided five years before the English statute of set off was passed, the court of chancery interfered to enforce this natural equity, as between the administrator of an insolvent estate and the complainant, between which complainant and the intestate there were mutual demands. The same principle was recognized by Lord Chief Justice Hale many years before.(*g*) And at this day, if the court finds a case of natural equity, not within the statute, it will permit an equitable set off, if from the nature of the claim, or from the situation of the parties, it is impossible to obtain justice by a cross action.(*h*)

Where there are mutual demands between the parties

(*d*) Green v. Farmer, 4 Burr. 2214, 2220. 5 Mason, 208. Ex parte Hanson, 12 Ves. 346. 19 id. 465. 2 Story's Equity, 659.

(*e*) See 2 Story's Eq. 659.

(*f*) 2 Eq. Ca. Abr. 10.

(*g*) See Chapman v. Derby, 2 Vern. R. 117.

(*h*) Lindsay v. Jackson, 2 Paige, 581. See Piggott v. Williams, Mad. & Geld. Rep. 95.

which cannot be set off under the statute, but which a court of equity may compensate or apply in satisfaction of each other without interfering with the equitable rights of any person, the fact that one of the parties is insolvent has frequently been held a sufficient ground for the exercise of the equitable jurisdiction of the court of chancery.(*i*) Thus, in *Pond* v. *Smith*,(*k*) the supreme court of Connecticut held that the insolvency of one of the parties was a sufficient ground for the interference of a court of chancery to offset mere legal demands against each other, although they were so situated as to be incapable of being set off at law; and that the complainant ought not to be left to pursue his legal remedy against the defendants, when from their insolvency no satisfaction of his demand could be thus obtained.(*l*) In another case, in the same court, it was decided to be a clear principle of equity, that where there are mutual liquidated debts not assigned, and one party is a bankrupt, there shall be a set off; but where a *bona fide* assignment has been made, antecedent to the bankruptcy, a set off cannot be decreed; and it makes no difference whether the debts were considerations for each other, growing out of the same transactions, or whether they originated from different contracts.(*m*)

(*i*) Lord Lanesborough v. Jones, 1 P. Wms. 325. 2 Paige, 582.

(*k*) 4 Conn. R. 302.

(*l*) See also Collins v. Farquar, 4 Litt. 153. Robbins v. Holley, 1 Monroe, 194. 3 id. 87. Tribble v. Taul, 7 id. 455. 4 Bibb, 356. Litt. Sel. Ca. 325, 488. 7 J. J. Marsh. 147.

(*m*) Shepard v. Tomlinson, 2 Swift's Dig. 149. 1 Monroe, 134.

And in a case where the defendant is insolvent, a set off will be allowed on the application of the complainant, although his debt is not yet due. But the rule is otherwise if the debt of the defendant to the complainant is payable at a future day.(*n*)

In *Green* v. *Darling*,(*o*) Judge Story examined and reviewed pretty thoroughly the doctrine of set off, whether arising from the statute, or as it is understood and acted upon by courts of equity, independent of any statute. He shows that courts of equity, following the doctrine of compensation of the civil law, to a certain extent, will set off distinct debts where there has been a mutual credit; while the mere existence of distinct debts is not sufficient to give the right, unless there is some mutual credit in relation to such debts, arising from the course of dealing between the parties. Hence, he observes, the right of set off does not attach to the debt itself, nor depend upon the mutuality of the debts in their origin as an inherent quality belonging to such debts, but upon the situation and rights of the parties between whom it is sought to be enforced. It is a privilege or right attaching to the remedy only; and which, by the laws of some of the states, may be allowed, while in others it is denied. But it touches not any obligation of contract or vested right. The right of set off is not an equity which the original debtor may, at all events, assert against the assignor or assignee of the debt whether

(*n*) Lindsay v. Jackson, 2 Paige, 581.
(*o*) 5 Mason, 202.

he has or has not notice of its existence. The court of chancery has, as yet, laid down no such general rule as that an equity exists to have debts set off against each other, which attaches to the debts themselves, and travels with them into whosever hands they may come; though it is doubtless true that where there are mutual subsisting debts, and either an express or implied agreement of stoppage *pro tanto*, or mutual credit, a court of equity will enforce it against the party himself, and against his assignee with notice.(*p*)

And there may be equities springing from other sources which would authorize a court of chancery to set off one demand against another, independently of any statutory regulations. As, for instance, the insolvency of one of the parties—a class of cases already mentioned.

It has been decided by the Vice Chancellor of the first circuit,(*q*) that there is no such thing as an inherent quality or right of set off in the creation of a debt or demand. It can only arise or attach where there is a mutuality of debts of such a certain and ascertained character as to be capable of set off, or of being applied in satisfaction of each other. Although chancery has sometimes exercised the power of decreeing a set off independent of the statute, it has only done so where there was either an express or

(*p*) See Wolcott v. Sullivan, 1 Edw. Ch. Rep. 402.

(*q*) See Hackett v. Connett et al. 2 Edw. 73. See also 5 Mason, 201.

implied agreement of stoppage *pro tanto*, or mutual credit.

The power of a court of chancery to offset one judgment or decree against another, *on motion*, is the same as that of the common law courts. But on a *bill* filed for an offset, the jurisdiction of the court of chancery is more extensive than that of the common law courts.(*r*) A court of law allows a set off of judgments *ex gratia* ; but in equity it is matter of right.(*s*) This power does not depend upon the statutes of set off, but upon the general jurisdiction of the court over its suitors. And it is an equitable jurisdiction.(*t*)

A court of chancery will entertain a suit for an equitable set off of one judgment against another, although the complainant has another remedy, by a summary application to the court of law in which the judgment against him was recovered. But as the complainant, in ordinary cases, has a more cheap and expeditious remedy by an application to the equity powers of the court of law, such suits will be discouraged in courts of equity by refusing costs to the complainant, except in special cases.(*u*)

In Kentucky it has been held that applications to set off one judgment against another are addressed to the equita-

(*r*) Dunkin v. Vandenburgh, 1 Paige, 622.
(*s*) Simson v. Hart, 14 John. 63, 75.
(*t*) Simson v. Hart, 1 John. Ch. Rep. 91. 14 John. 63.
(*u*) Gridley v. Garrison, 4 Paige, 647.

ble discretion of the court.(*v*) So payment and set off against a judgment at law are subjects of equitable jurisdiction, and where the defence was not made at law, equity will relieve. But if the demands are totally unconnected with the judgment, equity will not decree a balance to the complainant, but will stop with enjoining the judgment.(*w*) If the judgment enjoined and the claim sought to be set off against it grow out of the same transaction, however, a court of equity has jurisdiction to set off so much of the judgment as will satisfy the claim.(*x*) And it is sufficient to authorize a party against whom a judgment at law has been obtained, to come into a court of equity to set off demands not connected with the transaction on which the judgment was obtained, that there is no fund out of which he could recover his claim at law.(*y*)

Where a plaintiff and defendant have mutual judgments in different courts, and the defendant is insolvent, a set off will be allowed in equity, on the application of the plaintiff.(*z*)

A party cannot set off a judgment however, in any case, unless he is the beneficial as well as the nominal owner of it.(*a*)

(*v*) Davidson v. Geoghagan, 3 Bibb, 223. S. P. decided in South Carolina. See Tolbert v. Harrison, 1 Bailey, 599.

(*w*) Hughes v. McConn, id. 254.

(*x*) Lewis v. Forbes, 4 J. J. Marsh. 190.

(*y*) Pryor v. Richards, 4 Bibb, 356.

(*z*) Iredell v. Langston, Dev. Eq. Rep. 392. Holding v. Holding, 1 Mur. 1.

(*a*) Aikin v. Satterlee, 1 Paige, 289.

A judgment at law in favor of the defendant in equity against the complainant, may be set off on motion, against a decree in equity in favor of the complainant against such defendant for the payment of money due upon a mortgage. But a court of equity will not permit a defendant to offset against the complainant, in a suit in that court, a demand against him as a mere surety for the debt of a third person, for which the defendant has security upon a fund belonging to the principal debtor, sufficient to satisfy the debt.(*b*)

On a bill to foreclose a mortgage, a set off may be allowed, in this state, under the provisions of the revised statutes.(*c*) But no set off can be allowed in such a suit which would not be admissible in analogous cases at law. Therefore the debt which is sought to be set off must be one which was due and payable to the defendant at the commencement of the suit.(*d*)

It may be laid down as a general rule, that joint debts cannot be set off in equity, any more than at law, against separate debts, unless there be some other equitable circumstances.(*e*) But special circumstances may occur cre-

(*b*) Holden v. Gilbert, 7 Paige, 208.

(*c*) Id. 208, 211. Chapman v. Robertson, 6 id. 627. Roosevelt v. Bank of Niagara, Hopk. 579.

(*d*) 7 Paige, 208.

(*e*) Jackson v. Robinson, 3 Mason, 138. Greene v. Darling, 5 id. 209. Ex parte Twogood, 11 Ves. 517. 3 Meriv. 593, 618. 2 Leigh, 493. To authorize a set off at law or in chancery, the debts must be mutual, and due to and from the same persons in the same capacity. Palmer v. Green, 6 Con. Rep. 14.

ating an equity which will justify such a set off.(*f*) Thus, for example, if a joint creditor fraudulently conducts himself in relation to the separate property of one of the debtors, and misapplies it, so that the latter is drawn in to act differently from what he would, if he knew the facts, that will constitute a sufficient equity for a set off of the separate debt, created by such misapplication, against the joint debt in a case of bankruptcy.(*g*) So if one of the joint debtors is only a surety for the other, he may, in equity, set off the separate debt due to his principal from the creditor; for, in such a case, the joint debt is nothing more than a security for the separate debt of the principal; and upon equitable considerations, a creditor who has a joint security for a separate debt, cannot resort to that security without allowing what he has received on the separate account, for which the other was a security.(*h*) So, if, after a partnership is dissolved, and the partnership debts are paid, a surplus remains, a person who is indebted to the partnership, and is also a separate creditor of either of the partners, against whom a commission of bankrupt has issued, may set off the joint debt against the surplus to which the bankrupt is entitled.(*i*) And it seems that where two commissions of bankruptcy are issued against the same person, the one separate and the other a joint commission against him and another, a person indebted to the joint es-

(*f*) 2 Story's Eq. 663. 5 Cranch, 34.

(*g*) Ex parte Stephens, 11 Ves. 24. 19 id. 466. 12 id. 348. 3 Meriv. 621.

(*h*) Ex parte Hanson, 12 Ves. 346. 18 id. 232. Dale v. Cooke, 4 John. Ch. Rep. 15. 1 McCle. & Y. 307.

(*i*) Ex parte Quintin, 3 Ves. 248.

tate may set off a debt due to him from the separate estate.(*k*) And in *Ex parte Hanson*,(*l*) a separate debt owing from the estate of a bankrupt was allowed to be set off against a joint debt due to it, with liberty to prove the balance under the commission.(*m*) So where A. and B., who were joint partners, gave a joint and several bond to C. who afterwards became indebted to A., B. became bankrupt; C. proved the bond under the commission, and then brought a joint action against A. and B., to which B. pleaded his certificate. A. being thus precluded from setting off his separate debt, an injunction was granted against C.'s proceeding in the joint action.(*n*)

And it may be generally stated that a joint debt may, in equity, be set off against a separate debt, whenever there is a clear series of transactions, establishing that there was a joint credit given on account of the separate debt.(*o*)

Independently of the statutes of set off, courts of equity, in virtue of their general jurisdiction, are accustomed to grant relief in all cases where, though there are mutual and independent debts, yet there is a mutual credit between the parties, founded, at the time, upon the existence of some

(*k*) Ex parte Edwards, 1 Atk. 100. But see Ex parte Riley, W. Kel. 24.

(*l*) 12 Ves. 346.

(*m*) Bradley v. Millar, 1 Rose, 273.

(*n*) See 1 Buck, 125.

(*o*) Vulliamy v. Noble, 3 Meriv. 593, 617. Tucker v. Oxley, 5 Cranch, 34. 2 Story's Eq. 664.

debts due by the crediting party to the other. By mutual credit, in the sense in which the terms are here used, we are to understand a knowledge on both sides of an existing debt due to one party, and a credit by the other party, founded on, and trusting to, such debt as a means of discharging it.(*p*) Thus, for example, if A. being indebted to B. in the sum of 10,000*l*. on bond, B. should borrow of A. 2000*l*. on his own bond, the bonds being payable at different times, the nature of the transaction would lead to the presumption that there was a mutual credit between the parties as to the 2000*l*. as an ultimate set off, *pro tanto*, from the 10,000*l*. But if the bonds were both payable at the same time, the presumption of such mutual credit would be converted into almost an absolute certainty. Now in such a case, a court of law could not, independent of the statute, set off these debts against each other. But a court of equity would not hesitate to do so, either upon the ground of the presumed intention of the parties, or of what

(*p*) 2 Story's Eq. 659. Ex parte Prescott, 1 Atk. 231. In Hankey v. Smith, (3 T. R. 507, note,) it seems to have been thought by the court, that to constitute mutual credit, within the bankrupt acts, it is not necessary that the parties should mean particularly to trust each other in each transaction. In Trench v. Fenn, (Cooke, Bank. Laws, 569, 3 Doug. 257,) Mr. Justice Buller said: "Wherever there is a trust between two men, on each side, that makes a mutual credit." In Key v. Flint, (8 Taunt. 23,) Mr. Justice Dallas said mutual credit meant something different from mutual debt. Mutual credit must mean mutual trust. In Rose v. Hart, (8 Taunt. 599,) the court narrowed the extent of former decisions, and held that, in order to constitute a mutual credit, the demands must be of such a nature as must terminate in cross debts. See also Olive v. Smith, 5 Taunt. 60, 67; Atkinson v. Elliott, 7 T. R. 376; Easum v. Cato, 5 Barn. & Ald. 861.

is called a natural equity.(q) If, in such a case, there should be an agreement to set off the debts against each other, *pro tanto*, there could be no doubt that a court of equity would enforce a specific performance of the agreement, although at common law the party might be remediless.(r)

As respects equitable debts, or an equitable debt on one side and a legal debt on the other, Judge Story seems to be of the opinion that whenever there is a mutual credit between the parties touching the same, a set off is, upon that ground alone, maintainable in equity; though the mere existence of mutual debts, without such mutual credit, would not, even in a case of insolvency, sustain it.(s)

Where there is no set off at law, there must be special circumstances of equity to authorize a set off in chancery.(t) But in some cases the *inability* to set off a demand at law will afford a ground for coming into a court of equity. Thus, where a right of set off *exists* at law, but there are *difficulties* in relation to its exercise there, relief will be granted in chancery to the person claiming the set off.(u) In such cases, to use the language of Judge Story,

(q) 2 Story's Eq. 660, 1. 1 Peer Wms. 326. 2 id. 128. 1 Swanst. 33, 34. Prec. in Ch. 580. 5 Ves. 110.

(r) Id. 661. Jeffs v. Wood, 2 P. Wms. 128. Whitaker v. Rush, Amb. 403. 2 Eq. Abr. 10.

(s) 2 Story's Eq. 662.

(t) Mead v. Merritt, 2 Paige, 402. 1 id. 215. Colgin v. Cummins, 1 Porter, 148.

(u) McLaren v. Pennington, 1 Paige, 102.

in his valuable Commentaries on Equity: "The very defect of the remedy at law furnishes an almost irresistible reason for such equitable relief."(*v*) Therefore if the defendant's claim arises out of the same transaction or contract as that of the plaintiff, so that, in equity, the plaintiff never had any right to recover against him, and the defendant cannot avail himself of his defence at law, he will be relieved in chancery.(*w*)

If either of the debts is a debt *in auter droit*, there can be no set off in equity, any more than at law.(*x*)

Accounts claimed as a set off which are founded on a gaming consideration, are not grounds for relief in equity.(*y*)

An executor or administrator cannot, either at law or in equity, set off a demand purchased by him after the death of the testator or intestate, against a debt due by the estate to the person against whom he held the demand so purchased. For it is against the principles of sound policy to permit executors to purchase up claims against the creditors of the estate of the testator for the purpose of obtaining a set off in equity.(*z*)

(*v*) 2 Story's Eq. 669.

(*w*) Reed v. Bank of Newburgh, 1 Paige, 215. See also 3 Monroe, 87, 375. 6; 1 id. 194; 7 id. 455; 1 J. J. Marsh. 10; 2 id. 365; 3 id. 304, 327; 4 Litt. 155.

(*x*) Gale v. Luttrell, 1 Young & Jer. 180.

(*y*) Payne v. Loudon, 3 Bibb, 250.

(*z*) Mead v. Merritt, 2 Paige, 402.

Although a court of law declines to determine a question of set off, yet this is not *res judicata*, so as to preclude an inquiry in a court of equity having concurrent jurisdiction.(*a*)

In *Kentucky*, the court of chancery has jurisdiction of set off only in special cases; such as where the matter sought to be set off forms a part of the consideration of the original demand against which the set off is prayed; or where there has been an agreement between the parties to make such set off; or the matter of set off was understood at the time it arose as a partial payment of the original demand; or where some circumstance, such as the insolvency or absence of the party at law obstructs the adequate remedy which the law would give.(*b*) Or where the claim is one over which chancery held either exclusive or concurrent jurisdiction originally.(*c*) And the demands must be liquidated. A mere connection between the demands, where they are unliquidated, will not alone give equity jurisdiction.(*d*) Where the demand against which the set off is prayed has been assigned, it must appear that the insolvency of the party or his removal from the state,

(*a*) Hackett v. Connett, 2 Edw. 73.

(*b*) Collins et al. v. Farquar, 4 Litt. 155. Robbins et al. v. Holley, 1 Monroe, 194. 3 id. 87.

(*c*) Tribble v. Taul, 7 Monroe, 455. Durratt v. Kenton, 4 Bibb, 207. Id. 357.

(*d*) Collins et al. v. Farquar, 4 Litt. 155. Jones v. Murray, 3 Monroe, 87.

on which the right of set off is founded, occurred before the assignment.(*e*)

In *Pennsylvania*, the courts have adopted, to their full extent, all the doctrines of courts of equity with respect to equitable set offs.(*f*) Thus a bond given by the plaintiff to a third person, and by him informally assigned to the defendant, may either be set off against the plaintiff's demand, or given in evidence under the plea of payment.(*g*)

In *Alabama*, courts of equity, in general, follow the rules adopted by courts of law in relation to set off. But there are cases in which a set off is available in equity, which would not be so at law. Thus, in a matter where *mutual credit* is given between the parties, for a demand not allowable as a set off at law, equity will allow it. So where there is a special agreement to allow a demand as a set off which could not be set off at law, and it is doubtful whether the agreement could be enforced except in a court of equity.(*h*)

(*e*) Robbins v. Holley, 1 Monroe, 134. Bowman v. Halstead, 2 A. K. Marsh. 202.

(*f*) Morgan v. Bank of North America, 8 Serg. & Rawle, 88.

(*g*) Murray v. Williamson, 3 Binn. 135.

(*h*) Crawford v. Ex'rs of Simonton, 7 Porter, 110.

APPENDIX.

I. PLEAS AND NOTICES.

No. 1.

Plea of the general issue, with notice of set off, in assumpsit.

SUPREME COURT.

Richard Roe adsm. *John Doe.*

And the said Richard Roe, defendant in this suit, by William A. Beach, his attorney, comes and defends the wrong and injury when, &c. and says that he did not undertake and promise in manner and form as the said plaintiff in this suit hath above thereof declared against the said defendant, and of this he puts himself upon the country. And the said plaintiff likewise, &c.

W. A. BEACH, *Defendant's Attorney.*

Saratoga County, ss: Richard Roe, the above named defendant, being duly sworn, says, that he has fully and

fairly stated this case to William A. Beach, of Saratoga Springs, in said county, his counsel, and that he has a good and substantial defence on the merits to the whole or some part of the plaintiff's demand on the bill of exchange, [or, "*promissory note, written instrument, judgment, recognizance,*" *&c.*] on which this action is brought, as he is advised by his counsel, and verily believes to be true.

RICHARD ROE.

Sworn to before me, this 1st day of July, 1841.

S. J. COWEN, *Justice of the Peace.*

SIR,

Please to take notice, that the said defendant, at the trial of the above cause, will insist upon and give in evidence, under the general issue above pleaded, that the said plaintiff, at the time of the commencement of the action aforesaid, against the said defendant, was and still is indebted unto him in the sum of one thousand dollars lawful money of the United States of America, for divers goods, wares and merchandizes, before that time sold and delivered by the said defendant to the said plaintiff, and at the special instance and request of the said plaintiff. And in the further sum of one thousand dollars of like lawful money, for the work and labor, care and diligence of the said defendant by the said defendant and his servants before that time done, performed and bestowed in and about the business of the said plaintiff, and for the said plaintiff, and at his like request. And in the further sum of one thousand dollars of like lawful money, for money before that time

lent and advanced by the said defendant to the said plaintiff, and at the like request of the said plaintiff; and for other money by the said defendant before that time paid, laid out and expended for the said plaintiff, and at the like request of the said plaintiff. And for other money by the said plaintiff before that time had and received to and for the use of the said defendant. And also, that the said plaintiff, before the commencement of this action, accounted together with the said defendant, of and concerning the the said demand [or, *demands*,] of the said plaintiff against the said defendant, and also of and concerning divers other sums of money and accounts between the said plaintiff and the said defendant, and upon such accounting, the said plaintiff was found to be in arrear and indebted to the said defendant in the sum of one thousand dollars of like lawful money, which the said plaintiff undertook and then and there faithfully promised the said defendant well and truly to pay unto the said defendant when the said plaintiff should be thereunto afterwards requested. And also in the further sum of one thousand dollars, of like lawful money, upon and by virtue of a certain promissory note in writing, bearing date the 1st day of January, 1841, heretofore, to wit, on the day and in the year last aforesaid, at Saratoga Springs, in the county aforesaid, made by the said plaintiff, and whereby he, the said plaintiff, then and there promised to pay, two months after the date thereof, to the said defendant, or his order, the sum of one thousand dollars, for value received; which said several sums of money, or so much as will be sufficient for that purpose, the said defendant will set off against the demand of the said plaintiff to

be proved at the trial, and have the balance certified in his favor. Dated the 1st day of July, 1841.

Yours, &c.

W. A. BEACH, *Defendant's Attorney.*

To J. ELLSWORTH, Esq., *Plaintiff's Attorney.*

No. 2.

Plea of set off, in assumpsit.

1st Plea, General Issue, as above.

2d Plea.—And for a further plea in this behalf the said defendant, by leave of the court, here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said plaintiff, before, and at the time of the commencement of this suit, was, and still is, indebted to the said defendant in a large sum of money, to wit, the sum of one thousand dollars lawful money of the United States of America, for [*here state the subject matter of the set off, as in the above notice, if applicable. If the set off is of a special nature, it should be stated in the same manner, and with as much certainty, as would be requisite in a declaration for the same demand* ;]—which said sum [or "*sums*," *as the case may be*] of money so due and owing from the said plaintiff to the said defendant, exceeds [or, "*exceed*,"] the damages sus-

tained by the said plaintiff, by reason of the non-performance by him, the said defendant, of the said several supposed promises and undertakings in the said declaration mentioned; and out of which said sum (or, "*sums*,") of money so due and owing from the said plaintiff to the said defendant, he, the said defendant, is ready and willing, and hereby offers to set off and allow to the said plaintiff the full amount of the damages sustained by him, by reason of the non-performance of the promises and undertakings aforesaid, according to the form of the statute in such case made and provided. And this he, the said defendant, is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c. And also he prays judgment for the balance due from the said plaintiff to him, the said defendant, &c.

W. A. BEACH, *Attorney for defendant.*

Saratoga County, ss: Richard Roe, the above named defendant, being duly sworn says that he has read the above plea [or, "*heard the above plea read*,"] and knows the contents thereof; and that he verily believes the same to be true in substance and in matter of fact.

RICHARD ROE.

Sworn to, &c.

No. 3.

Plea of set off, where plaintiff is a mere trustee for another, or has no real interest in the suit.

[*Commence as in last form—then say,*] That A. B. for whose benefit this defendant avers this action is brought, in the name of the said plaintiff, and which said plaintiff has no real interest in the promises and undertakings aforesaid, upon which this suit is founded, before, and at the time of the commencement of this suit was, and still is, indebted to him, the said defendant, &c. [*as before—substituting the name of A. B. for "plaintiff," whenever necessary; and omitting the prayer of judgment for balance due to defendant.*]

No. 5.

Plea of set off, with pleas of general issue and tender.

And the said defendant by W. A. B., his attorney, comes and defends the wrong and injury, when, &c., and as to all the said several supposed promises and undertakings in the said declaration mentioned, except as to the sum of three hundred and forty dollars, parcel of the said several sums of money in the said declaration mentioned, says that he did not undertake or promise in manner and

form, as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, &c. And as to the said sum of three hundred and forty dollars, parcel of the said several sums of money in the said declaration mentioned, the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, to recover any more or greater damages than the said sum of three hundred and forty dollars, parcel, &c., in this behalf, because he says that after the making of the said several supposed promises and undertakings in the said declaration mentioned, as to the said sum of three hundred and forty dollars, parcel, &c., and before the commencement of this suit, to wit, on, &c., at, &c., aforesaid, he the said defendant was ready and willing, and then and there tendered and offered to pay to the said plaintiff the said sum of three hundred and forty dollars, parcel, &c., to receive which of the said defendant, he the said plaintiff then and there wholly refused: and the said defendant, in fact, further saith, that he the said defendant hath always from the time of the making of the said several promises and undertakings in the said declaration mentioned, as to the said three hundred and forty dollars, parcel, &c., hitherto, at, &c., aforesaid, been ready to pay, and still is ready to pay to the said plaintiff the said sum of three hundred and forty dollars, parcel, &c., and he now brings the same into court here, ready to be paid to the said plaintiff if he will accept the same; and this, he the said defendant is ready to verify; wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action against him,

to recover any more or greater damages than the said sum of three hundred and forty dollars, parcel, &c., in this behalf, &c. And for a further plea in this behalf, as to all the said several supposed promises and undertakings in the said declaration mentioned, [or, "*in the said first and third counts of the said declaration mentioned*,"] except as to the said sum of three hundred and forty dollars, [*the sum tendered*] parcel of the said several sums of money in the said declaration mentioned, the said defendant, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that before and at the time of the commencement of this suit, the said plaintiff was, and still is, indebted to the said defendant in a large sum of money, to wit, the sum of one thousand dollars, for [*state the subject matter of the set off, as in No.* 1,] which said sum [or, "*sums*"] of money so due, and owing from the said plaintiff to the said defendant, exceeds the damages sustained by the said plaintiff, by reason of the non-performance by him, the said defendant, of the said several supposed promises and undertakings in the said declaration mentioned, [or, "*in the said first and third counts of the said declaration mentioned*,"] except as to the said sum of three hundred and forty dollars, parcel, &c., and out of which said sum of money so due and owing from the said plaintiff to the said defendant, he the said defendant is ready and willing, and hereby offers to set off and allow to the said plaintiff the full amount of the said damages, except as aforesaid, ac-

cording to the form of the statute in such case made and provided. And this he the said defendant is ready to verify. Wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, except as to the said sum of three hundred and forty dollars, parcel, &c., and he also prays judgment for the balance that may be found due to him, &c.

No. 5.

Plea or notice of set off in actions by or against Assignees of Bankrupts, or Insolvents, Executors or Administrators.

In actions by assignees, or by or against executors or administrators, the plea or notice of set off is similar to the above forms, and states that the bankrupt, at the time of his bankruptcy, or the testator or intestate at the time of his death, was indebted, &c.; [*omitting the words "before and at the time of the commencement of this suit, was and still is"*]—and after setting forth the subject matter of the set off in the usual form, alleges, "which said sum of money is still wholly unpaid and unsatisfied; and the said plaintiffs, as assignees (or, "*as executors*" *or* "*administrators*,") as aforesaid, before and at the time of the commencement of this suit, were and still are indebted to the said defendant in the amount thereof." The plea or notice then concludes in the usual form, as in No. 2.(*a*)

(*a*) See Bab. Set Off, 173. 2 Chit. Pl. 475.

No. 6.

Set off on a promissory note made by the plaintiff, payable to defendant.

And also in the further sum of one thousand dollars, of like lawful money, upon and by virtue of a certain promissory note in writing, bearing date the first day of January, A. D. 1841, heretofore, to wit, on the day and year last aforesaid, at, &c. aforesaid, made by the said plaintiff, and whereby he the said plaintiff then and there promised to pay, thirty days after the date thereof, to the said defendant, or bearer, the sum of one thousand dollars, for value received.

No. 7.

Set off on a promissory note endorsed by the plaintiff to the defendant.

And also in the further sum of one thousand dollars, of like lawful money, upon and by virtue of a certain promissory note in writing, bearing date the first day of June, A. D. 1841, heretofore, to wit, on the day and year last aforesaid, at, &c. aforesaid, made by one John Styles; and whereby he the said John Styles then and there promised to pay, two months after the date thereof, to the said plaintiff, or his order, the sum of one thousand dollars, for value

received; and which said promissory note he the said plaintiff afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, indorsed and delivered to the said defendant; and which said promissory note, when the same became due and payable, according to the tenor and effect thereof, to wit, on, &c. at, &c. aforesaid, was presented and shown to the said John Styles for the payment thereof, but the said John Styles then and there neglected and refused to pay the said sum of money in the said promissory note specified, whereof the said plaintiff afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, had notice.

No. 8.

Set off on a bill drawn by the defendant, and accepted by the plaintiff.

And also in the further sum of one thousand dollars, of like lawful money upon and by virtue of a certain bill of exchange, bearing date the first day of January, A. D. 1841, heretofore, to wit, on the day and year last aforesaid, at, &c. aforesaid, made and drawn by the said defendant upon, and then and there accepted by, the said plaintiff, whereby he the said defendant requested the said plaintiff, two months after the date thereof, to pay to him the said defendant, or his order, the sum of one thousand dollars, for value received.

No. 9.

Set off on a bill indorsed by the plaintiff to the defendant.

And also in the further sum of one thousand dollars, of like lawful money, upon and by virtue of a certain ["*other*"] bill of exchange, bearing date the —— day of ——, heretofore, to wit, on the day and year last aforesaid, at, &c. aforesaid, made and drawn by the said plaintiff upon one James Jackson, whereby he the said plaintiff requested the said James Jackson, sixty days after the date thereof, to pay to him the said plaintiff, or his order, the sum of one thousand dollars, for value received; which said bill of exchange the said plaintiff afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, indorsed and delivered to the said defendant; and which said bill of exchange, when the same became due and payable, according to the tenor and effect thereof, to wit, on, &c. at, &c. aforesaid, was presented and shown to the said James Jackson for payment thereof; but the said James Jackson then and there neglected and refused to pay the said sum of money in the said bill of exchange specified, whereof the said plaintiff afterwards, to wit, on the day and year last aforesaid, at the place in the county aforesaid, had notice.

No. 10.

Set off for use and occupation, and for interest.

And also in the further sum of one hundred dollars, of like lawful money, for the use and occupation of a certain dwelling house, buildings and land, with the appurtenances of the said defendant, by the said plaintiff, and at his special instance and request, and by the sufferance and permission of the said defendant for a long time then elapsed had, held, used, occupied, possessed and enjoyed; and for other money due and owing from the said plaintiff to the said defendant, for interest upon, and for the forbearance of, divers large sums of money due and owing from the said plaintiff to the said defendant, and by the said defendant forborne to the said plaintiff for divers long spaces of time before then elapsed.

No. 11.

Set off on a bond made by the plaintiff payable to the defendant.

And also in the further sum of five hundred dollars of like lawful money, upon and by virtue of a certain bond or writing obligatory, made by the said plaintiff heretofore, to wit, on the 20th day of March, eighteen hundred and forty, at Saratoga Springs, in the county aforesaid, and sealed

with his seal, and now shown to the court here, the date whereof is the same day and year last aforesaid, whereby he the said plaintiff became held and firmly bound unto the said defendant in the penal sum of one thousand dollars of like lawful money, to be paid to the said defendant, when he the said plaintiff should be thereunto afterwards requested; which said bond or writing obligatory was, and is, conditioned for the payment of a certain sum of money, to wit, the sum of five hundred dollars, at a certain time therein mentioned, and which had elapsed before the commencement of this suit; and which said bond or writing obligatory, at the time of the commencement of this suit, was and still is in full force and effect, not released, paid off, satisfied, cancelled, or otherwise made void; and at the time of the commencement of this suit there was and still is due and owing from the said plaintiff to the said defendant, upon the said bond or writing obligatory, by virtue of the condition thereof, a certain sum of money, to wit, the said sum of five hundred dollars, to wit, at, &c. aforesaid.

No. 12.

Set off for money due on a judgment.

And also in the further sum of five hundred dollars of like lawful money, upon and by virtue of a certain judgment which he the said defendant heretofore, to wit, in January term in the year 1840, in the supreme court of

judicature of this state, before the justices thereof, recovered against the said plaintiff, in a certain plea of trespass on the case upon promises, whereby it was considered and adjudged that the said defendant should recover against the said plaintiff the said sum of five hundred dollars for his damages which he had sustained, as well by reason of the non-performance of certain promises and undertakings before then made by the said plaintiff to the said defendant, as for his costs and charges by him about his suit in that behalf expended, whereof the said plaintiff was convicted, as by the record and proceedings thereof remaining in the said supreme court of judicature before the justices thereof more fully appears; which said judgment still remains in full force and effect, not reversed, annulled, discharged, satisfied, or made void; which he the said defendant is ready to verify by the record.

No. 13.

Set off for rent due on a lease.

And also in the further sum of one thousand dollars of like lawful money, upon and by virtue of a certain indenture of lease, made heretofore, to wit, on, &c. at, &c. aforesaid, between the said defendant of the one part and the said plaintiff of the other part, (the counterpart of which said indenture, sealed with the seal of the said plaintiff, the said defendant now brings here into court, the date whereof is

the day and year last aforesaid,) whereby the said defendant demised certain tenements, with the appurtenances, therein mentioned, to the said plaintiff, for a certain term of years therein mentioned, to wit, for the term of three years from, &c. yielding and paying during the said term the yearly rent or sum of five hundred dollars, on certain days therein mentioned, to wit, on, &c. and in and by which said indenture he the said plaintiff covenanted with the said defendant to pay him the said rent of five hundred dollars on the days aforesaid, of which said rent afterwards, to wit, on, &c. a large sum of money, to wit, the said sum of one thousand dollars, for two years of the said term then elapsed, became and was, and still is in arrear and unpaid from the said plaintiff to the said defendant, to wit, at, &c. aforesaid.

No. 14.

Set off on a recognizance.

And also in the further sum of five hundred dollars, upon and by virtue of a certain recognizance, he the said plaintiff having, before the commencement of this suit, to wit, in the term of October in the year eighteen hundred and forty, come in his own proper person into the court of common pleas of the county of Oneida, before the judges thereof, and acknowledged himself to owe to the said defendant the sum of five hundred dollars, lawful money of the United

States of America, to be paid to the said defendant when he the said plaintiff should be thereunto afterwards requested; which said sum of five hundred dollars he the said plaintiff, for himself and his heirs, then and there consented and granted should be made of his and their lands, goods and chattels, and should be levied to the use and behoof of the said defendant; and which said recognizance is still in full force, strength and effect, not paid off, annulled or satisfied; as by the said recognizance remaining of record in the said court of common pleas of the county of Oneida will more fully appear, and which he the said defendant is ready to verify by the said record.

No. 15.

Set off in assumpsit of a specific joint debt against specific separate debts, by virtue of an agreement between the parties.

A. B.
ads.
G. H. & P. W. assignees of C. D.

And the said defendant, by W. A. B., his attorney, comes and defends the wrong and injury when, &c. and as to all the said several supposed promises and undertakings in the said declaration mentioned, except as to the sum of ten dollars, part of the said several sums in the said declaration mentioned, says that he did

not undertake or promise in manner and form as the said plaintiffs have above thereof complained against him; and of this he puts himself upon the country, &c. And as to the said sum of ten dollars, parcel of the said several sums of money in the said declaration mentioned, the said defendant says that the said plaintiffs ought not to have or maintain their aforesaid action thereof against him because he says that C. D. long before he became a bankrupt, [or, "*an insolvent debtor*,"] was indebted to the said defendant and E. F., his partner in trade, in the sum of fifty dollars for work and labor, &c. and that the defendant was indebted to the said C. D. before he became a bankrupt [or, "*an insolvent debtor*,"] in the sum of ten dollars; and that E. F. was also indebted to the said C. D. before he became a bankrupt, [or, "*an insolvent debtor*,"] in the sum of twenty dollars; and the said defendant says that it was thereupon agreed, before the said C. D. became a bankrupt, [or, "*an insolvent debtor*,"] between the said defendant and E. F. and C. D. to set off and deduct the said sums of ten dollars and twenty dollars from the said sum of fifty dollars; and that they, the said defendant and E. F., should only claim and demand against the said C. D. the residue and balance of the said sum of fifty dollars, after deducting thereout the said sums of ten dollars and twenty dollars. And the said defendant avers that he and the said E. F. have given to the said C. D. credit for, and have deducted and allowed the said sums of ten dollars and twenty dollars out of the said sum of fifty dollars, and have only claimed and proved, under the commission of bankrupt, awarded and issued against the said C. D. under

and by virtue of which the plaintiffs sue in this action as assignees, [or, "*claimed, and delivered an account to the said assignees for,*"] the balance of the said sum of fifty dollars, after deducting and allowing thereout the said sums of ten dollars and twenty dollars.

No. 16.

Plea of set off to an action of debt on a bond.

And for a further plea in this behalf the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that at the time of the commencement of this suit there was due and owing from the said defendant to the said plaintiff upon the said writing obligatory, by the said condition thereof, for the principal and interest in the said condition mentioned, a certain sum of money, to wit, the sum of one hundred dollars, and no more, to wit, at, &c. aforesaid. And the said defendant further says that the said plaintiff before, and at the time of the commencement of this suit, was and still is indebted to him, the said defendant, in a much larger sum of money than the money so due and owing from the said defendant, to the said plaintiff, upon the said writing obligatory, that is to say in the sum of two hundred dollars for, [*here state*

the subject matter of set off as in the preceding forms in assumpsit,] which said sum of money so due and owing from the said plaintiff to the said defendant, is wholly unpaid, and exceeds the money so due and owing from the said defendant to the said plaintiff, by virtue of the said condition of the said writing obligatory, and which said sum of money so due and owing from the said plaintiff to the said defendant, as aforesaid, or so much thereof as shall be necessary in this behalf, he, the said defendant, is ready and willing and offers to set off and allow against the said sum of money, so remaining due and payable by the condition of the said writing obligatory, according to the form of the statute in such case made and provided. And this he, the said defendant, is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

No. 17.

Set off in an action of assumpsit by a principal, for the price of goods sold to the defendant through the medium of an agent, of a debt due from the agent, to the defendant.

And for a further plea in this behalf, the said defendant, by leave of the court here for this purpose, first had and obtained according to the form of the statute in such case

made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said goods, wares, and merchandize, in the said declaration mentioned were sold to the said defendant by A. B. & Co., the factors of the plaintiff; that credit was given to the said defendant by the said A. B. & Co., and not by the said plaintiff, and that the said plaintiff did not appear in the transaction; nor was the said defendant aware, at the time the said goods, wares, and merchandize were sold to him by the said A. B. & Co. as aforesaid, that they were the property of the said plaintiff. And the said defendant further says, that at the time he so purchased the said goods, wares and merchandize of the said A. B. & Co., and at the time of the commencement of this suit, to wit, at, &c. aforesaid, the said A. B. & Co. were and still are indebted to him the said defendant, in a large sum of money, to wit, the sum of five hundred dollars, lawful money of the United States of America for [*here state the subject matter of set off, as in the preceding forms*] which said sum [or "*sum*"] of money so due and owing from the said A. B. & Co. to the said defendant, as aforesaid, exceeds [or "*exceed*"] the damages sustained by the said plaintiff by reason of the non-performance by him the said defendant of the said several supposed promises and undertakings in the said declaration mentioned, and out of which said sum of money so due and owing from the said A. B. & Co. to the said defendant, he the said defendant is ready and willing and hereby offers to set off and allow to the said plaintiff the full amount of the said

damages according to the form of the statute in such cases made and provided. And this he the said defendant is ready to verify. Wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

No. 18.

Plea of set off to an action of debt on two bonds, of two bonds given by the plaintiff to the defendant.

And for a further plea in this behalf, the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said bond or writing obligatory in the first count of the said declaration mentioned was and is conditioned for the payment of the sum of one hundred dollars of lawful money of the United States of America, and interest for the same, by the said defendant to the said plaintiff, on a certain day now past; and that at the time of the commencement of this suit against the said defendant in this behalf, there was due and owing from the said defendant to the said plaintiff, upon the last mentioned bond or writing obligatory, by the condition thereof, for the principal and interest in the said condition mentioned, a certain sum of money, to wit, the sum of fifty dollars, of

like lawful money, and no more, to wit, at, &c. aforesaid. And the said defendant further says, that the said bond or writing obligatory in the said last count of the said declaration mentioned, was and is conditioned for the payment of the sum of seventy-five dollars, of like lawful money, and interest for the same, by the said defendant to the said plaintiff, on a certain day now past; and that at the time of the commencement of this suit, there was due and owing from the said defendant to the said plaintiff, upon the said last mentioned writing obligatory, by the condition thereof, for the principal and interest in the said last mentioned condition mentioned, a certain other sum, to wit, the sum of fifty dollars, of like lawful money, and no more, to wit, at, &c. aforesaid. And the said defendant further says, that long before the commencement of this suit, to wit, on, &c. at, &c. aforesaid, the said plaintiff, by his certain bond or writing obligatory, sealed with his seal, and now shown to the court here, the date whereof is the same day and year last aforesaid, acknowledged himself to be held and firmly bound unto the said defendant, in the penal sum of one thousand dollars of good and lawful money of the United States of America, to be paid to the said defendant, when he the said plaintiff should be thereunto afterwards requested; which said last mentioned bond or writing obligatory was and is conditioned for the payment of the sum of five hundred dollars, of like lawful money, together with interest for the same, by the said plaintiff to the said defendant, at a certain day now past; and which said last mentioned bond or writing obligatory is still in full force and effect, and not in any wise released, paid off,

satisfied, or discharged, to wit, at, &c. aforesaid. And the said defendant further says, that long before the commencement of this suit, to wit, on, &c. aforesaid, at, &c. aforesaid, the said plaintiff, by his certain other bond or writing obligatory, sealed with his seal, and now shown to the court here, the date whereof is the same day and year last aforesaid, acknowledged himself to be held and firmly bound unto the said defendant in the penal sum of one thousand dollars of lawful money of the United States of America, to be paid to the said defendant, when he the said defendant should be thereunto afterwards requested; which said last mentioned bond or writing obligatory was and is conditioned for the payment of the sum of five hundred dollars, of like lawful money, together with interest for the same, by the said plaintiff to the said defendant at a certain other day now past, and which said last mentioned bond or writing obligatory is still in full force and effect, not in any wise released, paid off, satisfied, or discharged, to wit, at, &c. aforesaid. And the said defendant further says, that at the time of the commencement of this suit, there was and still is due and owing upon the said two last mentioned bonds or writings obligatory, by the respective conditions thereof, for the principal and interest in the said conditions respectively mentioned, a certain sum of money, to wit, the sum of one thousand dollars, of like lawful money, to wit, at, &c. aforesaid; which said last mentioned sum of money so due and owing from the said plaintiff to to the said defendant, greatly exceeds the moneys due and owing from the said defendant to the said plaintiff upon the said bonds or writings obligatory in the said declara-

tion mentioned, by the respective conditions thereof, for the principal and interest in the same conditions respectively mentioned; and out of which said sum of money so due and owing from the said plaintiff to the said defendant as aforesaid, he the said defendant is ready and willing, and hereby offers to set off and allow to the said plaintiff the said moneys so due and owing from him the said defendant to the said plaintiff as aforesaid, according to the form of the statute in such case made and provided. And this he the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

No. 19.

Plea of set off in covenant.

And the said defendant, as to the said supposed breach of covenant first above assigned, says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith that the said plaintiff, before and at the time of the commencement of this suit, was, and still is, indebted to the said defendant in a large sum of money, to wit, the sum of five hundred dollars for, &c. [*here state the subject matter of the set off as in assumpsit—see preceding forms,*] to wit, at, &c. aforesaid, which said sum of money so due and owing from the said plaintiff to the said defendant, exceeds the damages sustained

by the said plaintiff on occasion of the said supposed breach of covenant first above assigned as to the said sum of five hundred dollars, and out of which said sum of money so due and owing from the said plaintiff to the said defendant as aforesaid, he, the said defendant, is ready and willing, and hereby offers to set off and allow to the said plaintiff so much as will be sufficient to satisfy the damages by him sustained on occasion of the said supposed breach of covenant first above assigned, according to the form of the statute in such case made and provided, &c. And this he, the said defendant, is ready to verify. Wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against him, &c.

II. FORMS OF PROCEEDINGS TO OBTAIN PARTICULARS OF SET OFF.

No. 20.

Alternative order for particulars of set off.

SUPREME COURT.

John Doe
v.
Richard Roe.

Let the defendant's attorney deliver to the plaintiff's attorney an account, in writing, of the particu-

lars of the defendant's demand by him pleaded by way of set off [or "*which he has given notice that he will set off*"] in this cause by the 10th day of June instant, at ten o'clock in the forenoon; or show cause at that time at my chambers, in the town of Saratoga Springs, why he should not deliver such acconnt, or in default of doing so, why he should not be precluded from giving evidence at the trial in support of his plea [or "*notice*"] of set off; and in the meantime let all further proceedings in this cause be stayed.

Dated June 6th, 1841.

JOHN WILLARD.

No. 21.

Peremptory order for particulars of set off.

[*Title of cause.*] Let the defendant's attorney deliver to the plaintiff's attorney an account in writing of the particulars of the defendant's demand by him pleaded, by way of set off [or "*which he has given notice that he will set off*"] in this cause, within twenty days; or in default thereof, ordered that the defendant be precluded from giving evidence at the trial in support of his said plea [or "*notice*"] of set off. [*Dated and signed as in No.* 20.]

No. 22.

Bill of particulars of set off.

[*Title of cause.*] Sir: You will please take notice that the following are the particulars of the set off pleaded [or; "*of which notice has been given*"] by the defendant in this cause, to wit:

[*Dates.*] [*Items.*] [*Amounts.*]

Dated June 7th, 1841.

Yours, &c.

W. A. BEACH, *Defendant's Attorney.*

To J. ELLSWORTH, Esq., *Plaintiff's Attorney.*

No. 23.

Order for further particulars.

[*Title of cause.*] Let the defendant's attorney deliver to the plaintiff's attorney a further account, in writing, of the particulars of the defendant's demand by him pleaded by way of set off [or, "*which he has given notice that he will set off*"] in this cause, by the 20th day of June instant, at ten o'clock in the forenoon, or show cause before me at that time at my chambers, in the town of Saratoga Springs, why such further particulars should not be delivered; and in the meantime let all further proceedings in this cause be stayed. [*Dated and signed as in No.* 20.]

No. 24.

Order to show cause why particulars should not be amended.

[*Title of cause.*] On service of this order and a copy of the affidavit upon which the same is granted, let the plaintiff's attorney show cause before me at my chambers, in the town of Saratoga Springs, on the 25th day of June instant, at ten o'clock in the forenoon, why the bill of particulars heretofore furnished by the defendant in this cause should not be amended in the particulars specified in said affidavit; and in the meantime let all proceedings in this cause be stayed. [*Dated and signed as in No.* 20.]

III. REPLICATIONS.

No. 25.

Replication to a plea of set off, nil debet.

And the said plaintiff as to the said plea of the said defendant by him secondly above pleaded, saith that he the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him the said defendant,(*) because he says that he the said plaintiff was not nor is indebted to the said defendant in manner and form

as the said defendant hath above in his said last plea in that behalf alleged; and this he the said plaintiff prays may be inquired of by the country, &c.

No. 26.

Replication to a plea of set off, that A. B. is not interested in the suit.

[*As in No. 25 to the asterisk,*(*) *then continue as follows:*] because he says that this action is not brought for the benefit of A. B. in the said plea mentioned, but for the benefit of the said plaintiff exclusively; and this he the said plaintiff prays may be inquired of by the country, &c.

No. 27.

Replication to a plea of set off, that A. B., for whose benefit the suit is brought, is not indebted.

[*Commence as in No. 25, and continue to the asterisk,*(*) *then proceed as follows:*] because he says that A. B., for whose benefit this action is brought, was not, and is not now, indebted to the said defendant, in manner and form as the said defendant hath above in pleading alleged. [*Conclude as in No. 25.*]

No. 28.

Replication of the statute of limitations to a plea of set off.

And the said plaintiff as to the said plea of the said defendant by him secondly above pleaded, saith that he the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him the said defendant, because he saith that the said several supposed debts or causes of set off in the said last plea mentioned, did not nor did any or either of them arise or accrue to the said defendant at any time within six years next before the commencement of this suit, in manner and form as the said defendant hath above, in his said last plea in that behalf alleged. And this he the said plaintiff is ready to verify; wherefore he prays judgment, and his damages by him sustained on occasion of the non-performance of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

No. 29.

Replication of nul tiel record *and* nil debet *to a plea of set off on a recognizance and simple contract.*

And the said plaintiff as to the said plea of the said defendant by him secondly above pleaded, saith that the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him the said defendant, because as to so much of the said plea of the said defendant by him secondly above pleaded as relates to the said sum of three hundred dollars therein alleged to be due and owing from the said plaintiff to the said defendant on the said supposed recognizance in that plea mentioned, the said plaintiff saith that there is not any such record of the said supposed recognizance, in the said plea mentioned, remaining of record in the said court of common pleas of the county of Saratoga, in manner and form as the said defendant hath above in his said plea in that behalf alleged; and this he the said plaintiff is ready to verify, when, where, and in such manner as the court here shall direct and award; and because the justices of the said supreme court of judicature of the people of the state of New-York now here, will advise themselves upon the inspection and examination of the said record, by the said defendant in his said plea alleged, a day is given to the parties aforesaid, before the justices aforesaid, until to hear the judgment of the said court there-

upon, for that the said court now here are not yet advised thereof, &c. And the said plaintiff, as to the residue of the said plea of the said defendant, saith, that he was not, nor is, indebted to the said defendant in the said sum of or any part thereof, in manner and form as the said defendant hath above, in that part of his said plea in that behalf alleged; and this he the said plaintiff prays may be inquired of by the country, &c.

No. 30.

Replication to a plea of set off to debt on bond, protesting that more is due to the plaintiff on the bond than the sum admitted in the defendant's plea, and denying that the plaintiff is indebted to the defendant.

And the said plaintiff, as to the said plea of the said defendant by him secondly above pleaded, saith that he the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against him the said defendant; because, protesting that at the time of the commencement of this suit there was and still is a much larger sum of money than the said sum of due and owing for principal money and interest upon and by virtue of the said bond or writing obligatory and the said condition thereof, to wit, the sum of to wit, at, &c. aforesaid; nevertheless, for replication in this

behalf the said plaintiff saith, that he the said plaintiff was not nor is indebted to the said defendant in manner and form as the said defendant hath above in his said plea alleged; and this he the said plaintiff prays may be inquired of by the country, &c.

IV. REJOINDERS.

No 31.

Rejoinder to a replication of payment to a plea of set off to a judgment recovered, denying payment.

And the said defendant, as to the said replication of the said plaintiff to the second plea of the said defendant, saith that the said plaintiff ought not, by reason of any thing by him in that replication alleged, to have or maintain his aforesaid action thereof against him the said defendant, because he saith that after the recovery of the said judgment, and before the commencement of this suit, he the said plaintiff did not pay and satisfy to the said defendant the said sum of in form aforesaid recovered, or any part thereof, in manner and form as the said plaintiff hath above in that behalf alleged. And of this the said defendant puts himself upon the country, &c. And as to the said replication of the said plaintiff to the residue of the said plea of the said defendant, by him secondly above pleaded, and whereof he hath prayed may be inquired of by the country, doth the like.

ADDENDA ET CORRIGENDA.

Page 46, note (*m*). Add Nicoll v. Nicoll, 16 Wend. 446.

—— 48, —— (*v*). For "Ratty" read "Batty."

—— — —— (*y*). Add "This discordance in the practice of the different courts was, however, found so inconvenient, that Rule 93 of Hilary Term, 1832, was adopted by the assembled judges of all the courts, pursuant to the statute for promoting uniformity in the practice; the provisions of which rule extend to the several courts of law and equity, and establish a uniform system on that subject. That Rule is as follows: "No set off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set off is sought; provided nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted." (*See Charnock's New Rules*, 80; 4 *Bligh, N. S.* 604; 1 *Dowl. P. C.* 196; 3 *id.* 638.)

—— — —— (*a.*) Add, "But in the case of *Nicoll* v. *Nicoll*, (16 *Wend.* 446,) which was an appeal from the court of chancery, the court of errors decided that an attorney's lien for costs is no bar to a bill in chancery filed to obtain a set off; nor is it a bar when the question arises on a trial at law."

—— 146, line 13. For "date" read "state."

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THE END.

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